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Transformative Feminist Approach to Tort Law: Exposing, Changing, Expanding - The Israeli Case

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FOREWORD

Two years ago I was invited to speak at a faculty workshop in a prestigious university in Israel. Preparing for my lecture, titled "Women Victims of Sexual Violence Reclaiming Power Under Tort Law," I wondered whether I ought to commence the presentation by introducing the ostensibly clear need for feminist analysis of tort law. I decided to do so in order to provide background to the theoretical framework of the presentation. However, I realized five minutes into my address that, what I thought was a clear critical perspective of the gender bias embedded in tort law, was unclear to my audience of legal scholars. My presentation also awakened a sense of discomfort that required explanation, demonstration and justification of my perspective. To further this apparent need, the entire remainder of my lecture focused instead on what was meant to be an introductory note. This experience made me realize, as many other feminists probably do, that it will take a long while before scholars completely accept the contribution of feminist analysis to the development of tort law. Indeed, although this approach achieved dominance in the critical analysis of law as a whole, and in Israeli law in particular, it still has not attained the same recognition and legitimacy that other critical approaches enjoy, such as the realist approach or the economic analysis of law.

This anecdote exemplifies the need to dwell longer on the primary importance of legal critical analysis from a feminist perspective. Nevertheless, I chose in this article to refrain from re-challenging the basic premise that feminist analysis is indeed relevant to legal analysis. My article therefore adheres to the view that there is no need to repeatedly prove what is already obvious: that feminist analysis is as relevant to tort law—

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jurisprudence and reasoning—as it is to any other field of law.[1] Instead, I intend to discuss here the significant role feminist approach plays in developing and expanding tort law, as well as the richer understanding feminist approach has effected in this legal field. I use Israeli case law to exemplify this transformative influence. If I were to borrow a metaphor from the feminist conceptual dictionary, I would say that establishing and justifying the importance of feminist analysis in tort law is part of the "first wave" of feminist critique, while exploring the continuous contribution it has made to the development of that law can accordingly be considered the "second wave."[2] This article takes this second wave, created by the ripple effect of the first wave, as an opportunity for forging a theoretical standpoint to critically scrutinize the development of the first wave and recognize its effects. I argue that exploring this stage is crucial to determining the potential of feminist analysis for fostering improved access to justice for women, both by forging new tort doctrines and using the existing ones in a better, more nuanced manner.

Though this article focuses predominantly on the way in which feminist analysis influenced Israeli tort law, the domestic nature of feminist analysis carries within it a two-fold larger interest. Firstly, it demonstrates the cross-border influence of American scholars of tort law in the first wave of feminist analysis, indicating its transnational prominence as a primary tool of legal analysis. Secondly, based on its inception as well as development within common law tradition, Israeli tort law analysis can serve as a site for comparison and inspiration for other common law legal systems undergoing feminist critique.[3] More peculiarly to Israel, the rapid acceleration in the development of tort law during the past two decades has served as a comfortable cushion for the implementation of feminist theory and, accordingly, the expansion of its influence.

My article proceeds as follows: Chapter One consists of a short introduction where I present the structural difficulty feminist analysis encounters when applied to tort law. Chapter Two lays out an overview of the principal critique first wave feminist analysis offers on common law tort law. During this stage, I will argue that the main function of feminist analysis was to expose the gender biases inherent in tort law, and point out that tort law's supposed "neutral" and traditional application better served men's needs and interests than women's. Chapter Three introduces the

1. Readers who are new to this field and are interested in learning more about the nature of feminist legal analysis are hereby referred TO HILAIRE BARNETT, INTRODUCTION TO FEMINIST JURISPRUDENCE (1998); D. KELLY WEISBERG, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION, IN WOMEN IN THE POLITICAL ECONOMY (Ronnie J. Steinberg ed., 1996).

2. For an articulate introduction to this historical-conceptual divide, *see generally* SARAH GAMBLE, THE ROUTLEDGE CRITICAL DICTIONARY OF FEMINISM AND POSTFEMINISM (2000).

3. For similar comparison, *see* Yifat Bitton, *Liability of Bias: A Comparative Study of Gender-Related Interests in Negligence Law*, 16 ANN. SURV. INT'L & COMP. L. 63, 112–15 (2010) [hereinafter Bitton, *Liability of Bias*].

different patterns of transition that Israeli tort law has undergone following the first wave critique. This inquiry reveals that, after exposing Israeli tort law as entrenched in masculine perceptions and inclining to better protect men—an argument generally accepted as convincing and reliable—feminism-derived changes ensued. These changes are manifested in the way the courts understand and construe tort law, turning it into a richer source of feminine wealth. While this process is only just beginning, this article recognizes it as a second wave in feminist approach to tort law. What constitutes this trend as a transformative stage is its systematic and traceable effects, which are identified here as comprising the alteration of traditional doctrines and their expansion to include realms of accountability formerly unrecognizable under tort law. This trend facilitates a larger critical intellectual revolution within tort law, rendering feminist approach a transformative tool igniting internal critique of tort law. This praiseworthy achievement, however, is moderated by its limitedness, as Chapter Four indicates. The partial success in mainstreaming feminist analysis into tort law is due primarily to the fact that systematic gender-based discourse was not openly incorporated into tort case law, thereby allowing further production of androcentric rulings to linger.

I.INTRODUCTION

From both a conceptual and traditional perspective, tort law is considered an integral part of "private law" that is based upon a bilateral and apolitical foundation.[4] This characterization of tort law took shape towards the end of the 19th century, during the advent of modern tort law.[5] As tort law is located conceptually on the private side of the infamous dichotomy between private law and public law in Blackstonian[6] and libertarian[7] philosophy, two obstacles impede its feminist analysis. Firstly, all feminist analyses of the law are generally hindered by a traditionalist inclination to preserve the legal system as formal, scientific, apolitical, and even anti-

4. 2 WILLIAM BLACKSTONE, COMMENTARIES *116–17; ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 3–6, 8–11, 18–21, 36–38 (1995). Though people consider Weinrib's account of tort law extremely formalistic, they widely accept the perception underlying it—that tort law is private in its essence—in contemporary tort legal theory and adjudication. *See generally* JULES COLEMAN, RISKS AND WRONGS (1992); Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

5. The history of tort law's development from this intellectual perspective, mainly through the philosophical work of Oliver W. Holmes, is considered in EDWARD G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (2003). Scholars maintained the bilateral virtue of tort law also through fashioning specific doctrines in a way favorable to bilateralism. *See generally* Morton Horwitz, *The Rise and Early Progressive Critique of Objective Causation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 471 (David Kairys ed., 1990).

6. BLACKSTONE, *supra* note 4. Blackstone's distinction and its rationales are introduced in Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 757–58 (1943).

7. CAROLE PATEMAN, THE SEXUAL CONTRACT 90–91 (1988); ZILLAH R. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM 41–42 (1993).

political.[8] Under this premise, the feminist analysis of law is considered a manifestation of undoubtedly political interests that are estranged from legal reasoning.[9] This argument minimizes the ideological importance of feminist analysis. Indeed, rather than acknowledging that the goals of feminist analysis are to achieve egalitarian distribution of resources among minority groups and to disrupt the unequal balance of power in society, feminist analysis is diminished to a mere reflection of a feminine interest in protecting "women's rights."[10] The second obstacle that the feminist analysis of tort law encounters is tort law's function as private law, which thereby provides for the vindication of concrete rights in a bilateral dispute.[11] As such, political considerations that seek to redress the unequal distribution of wealth in society should not be considered when determining whether to impose responsibility for damages. Such an approach would violate the rights of the parties to have their dispute adjudicated according to their bilateral considerations alone.[12] Indeed, this notion was considered so fundamental to the construction and character of tort law, it also persuaded feminist scholars. Their failure lay in their own criticism between private law and public law, embodied in their substantial focus on arenas identified as belonging to public law. It is therefore understandable that feminist analysis of tort law was substantially delayed and occurred significantly later than other fields deemed to be public law, like family law, labor law[13] and criminal law, which feminists did thoroughly analyze. Even today, despite

8. Positivist philosophers of law primarily advocate this stance. *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW 79–91, 100–23 (2d ed. 1994). *See generally* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

9. *See generally* Jan Cowie, *Difference, Dominance, Dilemma: A Critical Analysis of* Norberg v. Wynrib, 58 SASK. L. REV. 357 (1994).

10. Feminist analysis provides comfort for all minority groups. Moreover, some contend that it specifically benefits men. *See generally* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996).

11. This difficulty is therefore unique to the feminist analysis of the private branches of law. It can also be observed in relation to contract law, another classic "private" branch of law. To illustrate this difficulty, *see generally* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991); Hila Keren, *Equal Contract Law—A Feminist Reading*, 31 MISHPATIM 269 (2000) (Hebrew) [hereinafter Keren, *Equal Contract Law*]; CONTRACT LAW FROM A FEMINIST PERSPECTIVE (The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 2005) (Hebrew); Hila Keren, *Contractual Rape Under the Anticipated Private Law Codification: Is There Anything New Under the Sun?*, *in* STUDIES IN LAW, GENDER AND FEMINISM (Daphna Barak-Erez ed., 2007) (Hebrew) [hereinafter Keren, *Contractual Rape*].

12. Though presented in rough terms, the analytical reason behind such an argument is nevertheless comprehensive. Enthusiastic advocacy of this claim can be found in Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987). For further exploration of commonly held arguments against the re-distributive analysis of tort law and their counter-arguments, *see generally* TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE (2007).

13. Labor law and family law may be categorized as areas of law that lay somewhere between the private and the public, due to the extent to which they are subject to state (family law) and federal (labor law) peremptory regulation and close supervision.

extensive feminist writings within private spheres of law, it is still apparent that feminist analysis focuses predominantly on public law.[14]

One of the first feminist writers to reject this approach to tort law was Leslie Bender, a prominent analyst of tort law. Bender decided to forego the traditional analytical approaches that differentiated between private and public law, choosing instead to apply traditional "feminist questions" to tort law.[15] Initially, Bender posed two basic questions: firstly, does tort law address the unique needs of women, and secondly, do tort law doctrines have unique influence upon women?[16] Bender was able to conclude that the answers to these questions were "no" and "yes," respectively. Subsequently, she deepened her research in order to determine the extent to which tort law doctrines have disregarded the needs of women and the repercussions of this disregard. Others followed Bender's pioneering analysis, which directed the extent and complexity of feminist analysis of tort law. Importantly, from its inception, the intended impact of Bender's analysis expanded beyond women to all groups disadvantaged by tort law, rendering her critique universal and more broadly justified.[17]

II. THE FIRST WAVE OF TORT-FEMINIST ANALYSIS: EXPOSURE

The two obstacles mentioned in this section's introduction largely sharped feminist analysis of tort law. In its initial stages, it was evident that the primary goal of feminist analysts was to expose the non-private and

14. A simple survey of classic legal-feminist writings demonstrates the disproportionate focus that the feminist analysis has placed on public law. *See, e.g.*, BARNETT, *supra* note 1 (no indication of private law feminist analysis) and Weisberg, *supra* note 1 (providing a comprehensive survey of the applications of feminist legal theory to specific areas of the law and feminine life-experiences, yet lacking any reference to private law considerations). *See also* Keren, *Equal Contract Law*, *supra* note 11, at 288–94. In Israel, an extensive book that adopted a feminist analysis of the law attempted to prevent a similar result. While this was the first book to address private law as an important area for feminist analysis, the majority of the book still focused on public law (five subdivisions), and only a relatively small part focuses on private law (two divisions). *See generally* DAPHNE BARAK-EREZ ET AL., STUDIES ON GENDER, LAW AND FEMINISM (2007).

15. The application of feminist questions serves as a useful tool for analyzing the law more generally. *See* Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, *in* FEMINIST LEGAL THEORY FOUNDATIONS 22–31 (D. Kelly Weisberg ed., 1993).

16. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 895–908 (1990) [hereinafter Bender, *Feminist (Re)Torts*]. Later, this question was more directly raised and answered in Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389 (1997).

17. Bender, *Feminist (Re)Torts*, *supra* note 16. Bender addresses methods of altering the prevailing account of supposedly equal power relations of parties to a tort action while, in reality, substantial power disparities characterize the typical tortfeasor-victim dyad. Her claim was illustrated on the non-gendered topic of mass torts. This was her early work in the area. The unique quality of her feminist work influenced the patterns of analysis of torts and is still acknowledged as influential today, as I will hereby show.

political character of tort law. This approach towards tort law had already been established by previous work which portrayed tort law as both politicized and public by nature. As early as the 1930s, several American realist intellectuals voiced their criticism of the politicization of private law.[18] The first to make a claim about tort law's political nature was realist scholar Leon Green. In his groundbreaking article titled, "Tort Law Public Law in Disguise," Green argued that tort law is used to cultivate public interests and serves as a means for social engineering.[19] Green's argument was not merely theoretical and descriptive; it was normative. According to his innovative stance, tort law is well suited to function as an arena for balancing the competing interests that society deems important. Indeed, tort law ensures that the interests of "the people" involved in every case—through judges, lawyers, and the jury—are taken into consideration and function to set this balance.[20] Green's account of tort law's politicized nature was succeeded over the next two decades by writers from Critical Legal Studies (CLS), whose writing also contributed to the understanding that tort law has clear political aspects.[21] Most prominent was legal historian Morton Horwitz's critique, which argued that tort law has shown, from its modern inception, a tendency to advance capitalist values. Thus arguing, Horwitz's argument extended Green's analysis. Horwitz contended that tort law not only fostered and promoted capitalist values; it was in fact part of the capitalist project itself.

Against the background of this progressive analysis, the establishment of a feminist analysis of tort law was substantially facilitated. Indeed, the feminist analysis is generally considered to have emerged as a jurisprudential branch from the CLS.[22] Here, too, it adopted the contention that the political slant of tort law was self-evident. This understanding of tort law set the conceptual stage for a second layer of analysis, where the pro-masculine tendency in tort law was exposed. As such, despite the two obstacles that traditional legal thinking posed, the feminist analysis of tort law succeeded

18. For seminal work, *see* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); R. L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

19. Leon Green, *Tort Law Public Law in Disguise* (part I), 38 TEX. L. REV. 1, 2–4 (1959); Leon Green, *Tort Law Public Law in Disguise* (part II), 38 TEX. L. REV. 257, 263–69 (1960).

20. Green's stance was that the voice of "the people" could be identified in the judge's own voice, which exercised political discretion when making decisions in torts. Green's realist stance, however innovative in its account of tort law as going beyond bilateral boundaries, is nevertheless unrealistic. In it, Green subsequently maintained that the voice of "the people" is identical to the voice of the judge, that the judges are unbiased themselves, that there is "one voice" reflective of "the people," and other assumptions of this kind that can be considered naïve.

21. *See generally* ABRAHAM HARARI, THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS (1962); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

22. Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 416–23 (1994).

in establishing itself as both legitimate and creditable. In the late 1980s and early 1990s, articles presenting a feminist analysis of tort doctrines and its application in court began to appear. These articles were awarded a respectable academic stage in reputable journals.[23] Among other topics, these articles focused on the central doctrine of negligence, liability for actions that cause indirect emotional damage, the definition of "a reasonable man," patterns of recognition for the principle of foreseeability, and the limitations of compensation for intangible interests.[24] The articles argued that tort law reflected masculine patterns of thought and lifestyle, and did not take into account women's gendered life experiences and tort-related needs. Therefore, the articles not only affirmed that injured women bear an unequal burden due to sustaining uniquely feminine harms but also, more importantly, these inequalities extended into and were reinforced by tort law.[25] In other words, despite the primacy of feminist analysis in law, many complex measures that influenced women stood in the way of exposing the gender bias that existed in tort law. Within the realm of tort liability, women suffered bias and had less legal protection than their male counterparts. Outside of the boundaries of tort law, this was used to reproduce and deepen androcentric stereotypes in society, which were integral parts of the disadvantaged position in which women were placed.

With the advancement of this focused analysis of tort law, a wider meta-theoretical critique of tort law began to take shape. This analysis that united a body of recognized and consistent critics, such as Martha Chamallas, Lucinda Finley, Anita Bernstein, and others, did not limit itself to one doctrine or another, or to a particular scandalous verdict, but began to express itself in more inclusive language that exposed the systemic masculine biases within tort law.[26]

Pursuant to the influence that U.S. feminist analysis of law had on Israeli general legal analysts, it was not surprising to discover that similar patterns of masculine biases existed in Israel and, in some cases, even more

23. *See generally* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. 391 (1996); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992); Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169 (1996).

24. *See generally* Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197 (1993); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870–1920*, 19 LAW & SOC. INQUIRY 369 (1994); Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

25. *See generally* Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367 (2001).

26. *See generally* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Leslie Bender, *An Overview of Feminist Tort Scholarship*, 78 CORNELL L. REV. 575 (1993).

intensely.[27] Like their U.S. counterparts, Israeli feminists first explored branches of public law and, two decades later, expanded their critique to branches of private law.[28] American influence was also evident in the initial preoccupation with detailed doctrines of tort law, which only subsequently developed into a broader analysis of the whole field: At first, the analysis was critical of the elements of reasonability and foreseeability in negligence law as failing to reflect life experiences that could be identified as "feminine" and patterns of societal conduct that primarily pertained to women, such as rape and domestic violence.[29] As it grew deeper, the analysis pointed out that tort law did not recognize intangible harms, which women predominantly incur, and also did not provide compensation for such damages.[30] The analysis also criticized "neutral" tort patterns that demonstrated gender biases when considered within the framework of female life experiences, such as giving birth.[31] In the final stage, the analysis called for a reevaluation of tort liability to take into account the gender power relations in shaping its doctrines, and for the acknowledgment that tort law should serve more prominently as recourse for alleviating the systematic suffering that characterizes women's lives.[32] Once feminist analysis penetrated Israeli tort law, the field started taking a slow yet traceable new turn in its development.[33]

27. For the influence American feminist thought and research patterns has had on the Israeli feminist development, *see generally* Leora Bilski, *Cultural Importation: he Occurrence of Feminism in Israel*, 25 IYUNEY MISHPAT 523 (2002) (Hebrew).

28. While feminist analysis of public law branches became prominent in Israel during the 1980s, the first article to entertain feminist analysis of private law was published only in the year 2000. Keren, *Equal Contract Law*, *supra* note 11 (criticizing the court's refusal to incorporate notions of equality into contract law doctrines). Before this article, an article criticizing the gendered notion of the "reasonable man" in criminal law addressed, incidentally, tort law's origin of this legal construct. *See* Orit Kamir, *How Reasonability Killed the Woman: The Heated Blood of the "Reasonable Man" and the "Reasonable Woman" in the Doctrine of Teasing*, 6 PLILIM 137 (1997) (Hebrew).

29. *See generally* Yifat Bitton, *"Feminine Life-Experience" and the Foreseeability of Harm*, 33 MISHPATIM 585 (2003) (Hebrew) [hereinafter Bitton, *Foreseeability of Harm*].

30. Daphne Barak-Erez, *Constitutional Torts in the Basic Law Era*, 9 MISHPAT UMIMSHAL 103, 121–22 (2005) (Hebrew). *See generally* Yifat Bitton, *Dignity Aches—Compensating Constitutional Intangible Harms*, 9 MISHPAT UMIMSHAL 137 (2005) (Hebrew) [hereinafter Bitton, *Dignity Aches*]; Yifat Bitton, *The Worth of Tears—Protecting Gender-Related Interests in Negligence Law*, *in* READING IN GENDER, LAW AND FEMINISM 233 (Daphne Barak-Erez et al. eds., 2007) (Hebrew).

31. *See generally* Tsachi Keren-Paz, *A Feminist-Distributive Gaze over the Duty of Care of Pregnant Women: Ideology, Symbolism and Pragmatism*, *in* READING IN GENDER, LAW AND FEMINISM 321 (Daphne Barak-Erez et al. eds., 2007) (Hebrew).

32. *See generally* Yifat Bitton, *Bringing Power Relations Within the Scope of Negligence Liability*, 37 MISHPATIM 1 (2008) (Hebrew) [hereinafter Bitton, *Power Relations*].

33. Due to space constraints, and to my wish to be able to present an overarching review of the contribution feminist critique has made to the reshaping of this legal field, the discussion herein will focus on Israeli tort law alone.

III. THE SECOND WAVE OF FEMINIST TORT ANALYSIS: MODIFICATION AND EXPANSION

Determining the importance of the modification that each of the waves of feminist analysis has generated in tort law would be impossible, as each stage depended on the preceding one. The argument is substantively circular.[34] The stages interwove so closely with one another that they have become inextricably linked. Their contributions must therefore be considered as one single contribution. However, if it were possible to rank the contributions of the various stages separately, according to the extent to which they have each enriched the understanding of tort law, the second stage would undoubtedly be ranked the highest. Its distinction lies in the fact that it enabled the change and expansion of tort law in a way that not only deepened the influence of feminist analysis, but also allowed for a greater understanding of it, and for the formation of new, creative, and important areas in tort law for the betterment of women.

In order to integrate the feminist analysis, this advanced stage required both theoretical and practical work in relation to tort law. As such, this stage worked on fertile ground. Israeli tort law experienced dramatic expansion over the last two decades, with the last decade in particular being almost unparalleled in the rest of the world. Out of the multitude of examples representing this phenomenal change, here are a few central ones: as opposed to the general trend in common law countries, the courts extended the protection of tort law in Israel to cases where diverse uncertainties governed the causal relation between the plaintiff and the defendant;[35] one court found a father liable for intangible damage he had caused to his children as a result of "fatherhood neglect," a precedent that had never before occurred worldwide;[36] the judiciary expanded the element of foreseeability to cases where it was impossible to find precedent to similar harmful facts elsewhere in the world;[37] the court also recognized the protection of a patient's autonomy, regardless of whether the medical procedure he underwent was successful or not.[38] These examples and many others of their kind reflected

34. This idea is generally reflected in a recent and ambitious project of laying out holistic feminist critique of tort law in FEMINIST PERSPECTIVES ON TORT LAW (Janice Richardson & Erika Rackley eds., 2012).

35. The following cases most clearly present this trend: HCJ 1639/01 Maayan Zvi Communal Residence v. Krischov 58(5) PD 215 [2004] (Isr.) (uncertainty as to the material cause of the injury); HCJ 361/00 Daher v. Deputy Yoav 59(4) PD 310 [2005] (Isr.) (lack of evidence proving the cause of harm was ignored by applying the loss of evidence doctrine); HCJ 7375/02 Carmel Hospital v. Malul 60(1) PD 11 [2005] (Isr.), *restricted by* HCJ 4693/05 Carmel Hospital v. Malul (Aug. 29, 2010), Nevo Legal Database (by subscription) (Isr.) (Additional Review).

36. HCJ 2034/98 Amin v. Amin 53(5) PD 69 [1999] (Isr.).

37. HCJ 7794/98 Moshe v. Klipford 57(4) PD 721 [2003] (Isr.) (Additional Review). Prominent Israeli tort scholars found this decision to overly expand the limits of tort liability to remote harms. *See generally* Ehud Guttel & Israel Gilead, *Expanding Liability Through Causation—A Critical View*, 34 MISHPATIM 385 (2004) (Hebrew).

38. HCJ 2781/93 Daaka v. Carmel Hospital 53(4) PD 526 [1999] (Isr.).

a decade in the development of Israeli tort law which saw its expansion into new areas of accountability, some of which were completely new, and others from which plaintiffs had previously been barred. This development of Israeli tort law facilitated and eased the integration of the feminist analysis of tort law both theoretically and practically. It is important to note the bilateral relationship between the theoretical approach and practical implementation of the feminist analysis in the Israeli case. Indeed, the former ensured that plaintiffs filed appropriate claims to advance the feminist analysis, and also in cooperation with it. As I will later demonstrate, it is possible to mark a significant feminist contribution to the development of a unique pattern of influence on tort law.

A. FEMINIST TORT ANALYSIS DRIVEN MODIFICATIONS

The influence that feminist analysis had over changes in tort law was versatile. Since feminist analysis itself is rich and relevant to various analytical approaches, the result of its permeation into tort law was diverse and varied. In this section of the article, I intend to present the most noticeable and important changes this permeation instigated.

1. Legislative Change

Despite appearing counterintuitive to the judiciary's normative strength in common law tort law systems, it seems that legislative reform was the simplest way to amend tort law to accommodate some of the missing female and feminist elements. The first identified case of adopting a feminist analysis to tort law was the enactment of Sexual Harassment Prevention Act of 1998.[39] Similar to Anglo-American tort law, legal precedents through the common law system primarily shaped the development of Israeli tort law, which therefore required a gradual learning process by the judiciary. Conversely, the advantage of the external virtue of a statute enacted as a consequence of feminist lobbying was clear. Since women predominantly experience sexual harassment, prohibiting sexual harassment and providing a mechanism by which victims can recover compensation for its harmful effects demonstrated a clear injection of feminist conceptualization into tort law.[40] Moreover, to overcome traditional conceptual and practical barriers, the law established a mechanism for easy compensation to which a claimant was almost automatically entitled once sexual harassment was proved; the element of damage and its details did not need to be proven.[41] This mechanism was specifically useful for sexual harassment victims, in light of

39. Sexual Harassment Prevention Act, 5748-1998, SH No. 1661 p.166 (Isr.).

40. The statute provides that both sexual harassment and associated adverse treatment constitute compensable torts. *See* Articles 3 and 6(a) of the statute, respectively.

41. Provision 6(b) of the statute provides that: "the court may grant . . . a sum not exceeding 120,000 IS, without proof of harm." Sexual Harassment Prevention Act, 5748-1998, SH No. 1661 p.166 (Isr.) as amended by Sexual Harassment Prevention Act (Amendment no. 9), 5773-2013, SH No.2406, p.203 (Isr.).

the fact that the typical harms they sustain are incompatible with tort law's infamous adherence to protecting against physical harms.[42] Applying a broad definition to determining what constitutes sexual harassment and recognizing its inherent harms, the legislation incorporated a feminist approach and influence upon tort law.

The legislative process involved the adaptation and recognition of the statute from outside the framework of traditional tort law,[43] and the statute proclaimed to be an integral part of tort law.[44] Notwithstanding its efficient incorporation into tort law, the process became a double-edged sword.[45] Indeed, as the genesis of the statute did not follow the traditional "from within" development of tort law, it was left standing as an "outsider" to tort law's common collective and its implementation was ill-suited.[46]

The problems associated with the Act were sufficiently serious to warrant the appointment of a public committee whose mandate was to recommend extensive changes to improve the Act's effectiveness.[47] Many put forth suggestions regarding the reasons for the courts' failure in upholding the legislation.[48] I would like to propose my own contention: The courts failed to uphold the legislation due to (1) the statute's development outside of the framework of traditional tort law and (2) the dearth of

42. *See generally* Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79 (1986).

43. For a detailed analysis of the formulation and development of this statute, *see generally* Orit Kamir, *What Kind of Harassment: Is Sexual Harassment a Violation of Equality or Human Dignity?*, 29 MISHPATIM 317 (1998); Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391 (2008).

44. Provision 6 of the statute states: "an action against this law should be deemed tortious and be adjudicated according to the Tort Ordinance." Sexual Harassment Prevention Act, 5748-1998, SH No. 1661 p.166 (Isr.).

45. For using this advantage within tort law, *see* Epstein, *supra* note 4, at 1725–26. Epstein's argument, conceptual and normative in nature, is that it will bring about systematic change more efficiently than through the routine use of case law.

46. My analysis here focuses on assessing the law solely from a tort law perspective. In other terms, such as socially, the statute had strong positive impact on educating the Israeli public to regard sexual harassment as unacceptable. *See generally* Orit Kamir, *The Israeli Law Against Sexual Harassment—Where Are We After a Decade?*, 9 LAW AND BUSINESS 9 (2008) (Hebrew).

47. Israeli Parliament member Gila Gamliel originally sponsored the Committee on Sexual Harassment, which was established in 2009. The author of this article was nominated as one of its members.

48. Sharp critique of the statute as promoting moral cleanliness rather than abolishing power relations is offered in Noya Rimalt, *About Sex, Sexuality and Respect: Sexual Harassment Law and Feminist Theory Test Legal Reality*, 35 MISHPATIM 601 (2005) (Hebrew) and Noya Rimalt, *On Law, Feminism and Social Change: The Case of the Prevention of Sexual Harassment*, STUDIES IN GENDER AND FEMINISM 985 (2007) (Hebrew). For like contention regarding the prevailing account of sexual harassment statutes, *see generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). It appears that even Orit Kamir, the leader of the law's legislative process, who is considered its "spiritual mother," recognizes that it has failed to fulfill some of its expectations. Kamir, *supra* note 43, at 64–71.

translating its progressive feminist terms to familiar "tort" language to enable and ease absorption into the field. One example of this deficiency is the neglect to treat the damage sexual harassment causes as consequential, as opposed to inherent, and to refrain from establishing a set of measurable parameters to assess its monetary value.[49]

Despite these misgivings, the Sexual Harassment Prevention Act has been firstly and importantly a step in openly using the tort arena as means to achieve gender equality. It has opened the conceptual door to recognizing tort law's potential to protect women from oft-encountered female suffering.

2. Modifying Existing Doctrines and Reading Them Anew: Gender Mainstreaming

The idea of mainstreaming gender, as it was conceptualized in international feminist work, is to produce patterns of thought to which gender insights are integral.[50] Under prevalent political thought, it is assumed that "feminist insights" should be limited to areas that can be systemically identified as "feminine by nature," such as rape or birth. Feminists' call for mainstreaming, however, goes against this grain of thought; they stress that people should consider gender implications of political, legislative, and judicial decisions in all areas of life, and not confine these insights within an explicit relationship to gender. Indeed, examples of gender-based thinking can be found in areas that do not directly deal with life experiences that are essentially "feminine."[51]

49. *See generally* Bitton, *Dignity Aches*, *supra* note 30. In this respect, the Sexual Harassment Prevention Act differs from other laws of tortious nature located outside the Israeli main statutory tort source, namely The Tort Ordinance (New Version), 5728-1968, 10 LSI 266 (1968) (Isr.). Such laws include, *inter alia*, the Defamation Act, 5725-1965, SH No. 464 p. 240 (Isr.) and the Car Accident Physical Injury Act, 5735-1975, SH No.780 p. 234 (Isr.). The geneses of these statutes reflect a process working "from the inside to the outside." That is, they shield interests traditionally recognized and protected under tort law. Defamation is one of the oldest injustices tort law recognizes, and car accidents used to be administered within the framework of the tort of negligence, until both topics were assigned a separate statutory framework meant to better fit their protectionist function. In this sense, sexual harassment, as a cause of action, was "forced" onto tort law, in an opposite process of working "from the outside to the outside." This external legislative manner was dictated by virtue of it being unfamiliar to tort law.

50. Gender mainstreaming was thus defined by the United Nations Report of the Economic and Social Council for 1997, A/52/3 (Sept. 18, 1997):

> Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

51. To learn more about the concept of feminine life experience, *see* Robin West, *Jurisprudence and Gender* 55 U. CHI. L. REV. 1, 14 (1988).

The notion of gender mainstreaming is particularly valuable in feminist analysis of tort law, an area that appears gender neutral, for two reasons. Firstly, there is great value in exposing the gendered nature and significance of what is mistakenly thought of as "neutral laws," as shown by the influential work done in the earlier stages of feminist analysis. Secondly, analyzing the significance of tort doctrines to women should be introduced to the most prosaic patterns of legal analysis—those the courts routinely practice—which go unchallenged. This is the essence of feminist mainstreaming in law. It does not necessarily stem from dramatic direct and premeditated feminist attack of patriarchal constructs that ultimately became monumental feminist victories—such as the cases of enlisting women into the Israeli Air Force,[52] or appointing women to religious councils[53]—in order to awaken feminist insights. Rather, feminist mainstreaming uses commonplace events, such as a car accident. This is the most challenging bottom-up approach feminist analysis of tort law uniquely offers to changing existing law. Drawing on Hanna Arendt's notion of "The Banality of Evil," I consider such analysis to offer us a glance at the nature of tort law as requiring ongoing feminist critique of its trivialities.

An example of the virtues of this approach is the case of a male plaintiff who was involved in a car accident and whose case sparked feminist discussion. The case of *Pedro v. Midgal Insurance Ltd.*[54] began, like many others, as a routine claim in an Israeli district court following the horrors of a car accident. The plaintiff, a 22-year-old man, had been seriously injured in the accident, and consequently incurred severe functional disability. Among other things, he suffered urological injuries, which were expected to cause him sexual dysfunction for the rest of his life. As part of his compensation under the tort system, he requested funding for sexual treatment by a sexual surrogate, who would teach him how to regain engagement in sexual relations with women.[55] His request was rejected. Rather, the district court, acting on its own initiative, deemed the youth's injury to be "impotence," and ruled that he ought to be compensated for such damage with medicinal treatment and/or referral to an escort. By analogizing

52. HCJ 4541/94 Miller v. Minister of Defense 49(4) PD 94 [1995] (Isr.).

53. HCJ 153/87 Shakdiel v. Minister of Religious Affairs 42(2) PD 221 [1988] (Isr.).

54. HCJ 11152/04 Pedro v. Migdal Insurance Ltd. 61(3) PD 310 [2006] (Isr.).

55. Sex Surrogates are (mainly) women who use practical-physical therapeutic methods to facilitate others with desired satisfying sexual skills. *See generally* R. Aloni, O. Keren, & S. Katz, *Sex Therapy Surrogate Partners for Individuals with Very Limited Functional Ability Following Traumatic Brain Injury*, 25 SEXUALITY & DISABILITY 125 (2007). The effectiveness of this practice is professionally questioned. *See* Dean C. Dauw, *Evaluating the Effectiveness of the SECS' Surrogate-Assisted Sex Therapy Model*, 24 J. SEX RES. 269, 269–74 (1988). Feminist critique questions the ethics of surrogacy, even when intended for medical purposes. *See generally* Joan Mahony, *An Essay on Surrogacy and Feminist Thought*, 16 J.L. MED & ETHICS 81 (2007).

medical treatment and the use of a prostitute,[56] the court bestowed mystical therapeutic merits to the ill-reputed experience of exploiting women's bodies in a brothel.[57]

In recognizing that using the services of a prostitute is a legitimate category of compensation, the court did not set a new precedent. Rather, the judgment joined a series of other cases in which the courts awarded claimants, who were all men, damages for the purpose of employing the services of prostitutes.[58] Indeed, the courts routinely awarded such compensation as simply another component of the customary "compensation package."[59] More to the point, the *Pedro* case made its way to the Supreme Court only because the rivaling parties both appealed the amount of compensation the lower court eventually awarded the plaintiff.[60] It was only then that the head of damage discussed was conceptualized as problematic. The court began its analysis by interpreting this head of damage from an internal tort perspective. As such, it reclassified the claimant's sexual injury by utilizing the grammatical rules of torts, therefore categorizing it as non-pecuniary, as opposed to the pecuniary trait the district court assigned to it. Such a move would have sufficed in order to disqualify this head of damage, which the district court calculated according to the estimated costs of paying a prostitute for regular sexual encounters. However, the court, under Chief Deputy Justice Rivlin, did not stop there. In the second stage of evaluation, Justice Rivlin's progressive analysis focused on how acknowledging such head of damage in tort law constitutes the district court's indirect recognition of prostitution and its normalization as a consequence. From thereon, the

56. I deliberately chose to use the term "prostitution" because the courts' use of the euphemism "escort services" serves to sanitize the abhorrent social phenomenon of paying a woman for the entitlement to use her body sexually.

57. CC (TA) 1553/99 Pedro v. Migdal Insurance Ltd., (Oct. 26, 2004) Nevo Legal Database (by subscription) (Isr.). *See particularly* ¶ 7 in Judge Pilpel's decision.

58. The plaintiffs in these cases were predominantly—not to say only—men who sought redress for the harm they suffered due to the injury of their sexual pleasure. *See* Justice Rivlin's review of the available case law, *id*., ¶¶ 12–14. Thus, this area of compensation is constructed as gender oriented, where men are practically the sole beneficiaries of human sexual pleasure. Moreover, in the few reported Israeli cases in which a woman plaintiff has invoked sexual surrogacy, the courts declined her plea by adding a new demand to allow compensation for this damage, stating that she needed to prove her specific interest in pursuing this type of relief. Like demand has not been used before or after this decision was given. CC (Hi) 709/93 Mizrahi v. Lion Insurance LTD (Aug. 8, 1999), Nevo Legal Database (by subscription) (Isr.); CC (Jerusalem) 1686/96 Avraham v. Mayaney Hayeshua Hospital (July 27, 2006), Nevo Legal Database (by subscription) (Isr.).

59. Justice Rivlin presented in his decision the sum of damages granted in the past for plaintiffs in like cases. HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶ 8.

60. In cases where the court did not award this compensation component, it was due to evidence related difficulties regarding proof of the harm rather than substance related considerations, which Justice Rivlin's survey showed. Only one justice refused to cooperate with this compensation method, which he defined as contrary to public policy in CC 1102/94 Dayan v. Fund for Compensating Victims of Car Accidents (Aug. 1, 1999), Nevo Legal Database (by subscription) (Isr.). Interestingly, this was the same judge who also gave an important feminist ruling in a case regarding gang rape, which is discussed *infra* Section 1.3.

court appeared to transcend formal tort law discourse and proceeded to describe the horrors of prostitution and of sex trafficking that prevails in Israel, praising the uncompromising national efforts to erode it by both legal and executive means.[61]

Still, this judgment did not remain outside of the law of torts. Upon establishing the harms of prostitution and sex trafficking in Israel, the court returned to tort law. Paraphrasing the principle of *restitution in integrum* underlying tort law, Justice Rivlin declared, "Not every status deserves being restored."[62] In this way, the court activated a socially contextual feminist analysis of the most fundamental principle of tort law, according to which its basic objective is to put the successful plaintiff in the position he or she would have been had the tortious action not been committed.[63] The court applied the principle of public policy as an obligatory interpretation which seeks to ensure that women are not injured as a consequence of tort law and, based on this interpretation, rejected such a head of damage since it would be tainted by illegal actions and the exploitation of women in prostitution, which injures their basic rights.[64] Moreover, the court's obligation to women's suffering in prostitution was not based on an ethical approach disgusted by the immorality of prostitution, but rather on a fear of the exploitation of women through prostitution. Justice Rivlin's offered clarification made it evident that, if the court maintains this interpretation under the paradigm of exploitation, this interpretation will correctly guide other tort verdicts that might touch upon the issue of prostitution. For

61. The reason for this change in perception is not visible in the judgment of the case. It is likely, however, that the amicus curiae the Legal Clinic for Women's Rights filed, which clarified the significant feminist value of the issue, contributed to this change. It is important to note that, within the Israeli feminist community, the prevailing stance is that prostitution is inherently oppressive and exploitive, and perpetuates the subjugation of women as sexual objects used to pleasure men. *See* NAOMI LEVENKRON & YOSSI DAHAN, HAIFA FEMINIST CTR. & ADVA CTR., A HUMAN EXCHANGE: TRAFFICKING OF WOMEN IN ISRAEL 14–16 (2003). The Supreme Court reinforced this stance in its rulings. *See, e.g.*, HCJ 3520/91 Turgeman v. The State of Israel, 47(1) PD 441 [1993] (Isr.); HCJ 2885/93 Tomer v. The State of Israel, 48(1) PD 635 [1994] (Isr.). Justice Rivlin's approach can be easily associated with this perception of prostitution as invariably negative. In accordance with this approach, he opined that providing compensation for damages under the tortious guise of restoring the victim's position prior to the tortious conduct is immoral and would therefore be contrary to the principle of "public policy." Justice Rivlin further added that such disposition "is likely to influence the implementation of the principle of 'restoration' where the previous state or condition involves illegality or injury to the basic values of society." HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶¶ 19–21. Justice Rivlin repeatedly expresses this position in the ruling. Chief Justice Barak, on the other hand, left the issue of recognizing "escort services" as unresolved compensation. Justice Beinisch (a woman) concurred and agreed in principle with Justice Rivlin's public policy concerns, though qualified it by stating there was still left a "question of whether there is an exception to the wide rule, and if so, we leave the scope of this exception for a future discussion." *Id.*

62. HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶¶19-21.

63. Common law case law first recognized this maxim. See the famous saying by Lord Blackburn in *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 39 (1880).

64. HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶¶16–21.

example, if a case requires acknowledgment of a woman's income as a prostitute, the court will not withhold compensation for that woman's injuries simply because of the negative connotation of prostitution.[65]

The court's usage of two methods of interpretation revealed that the relative strength of external feminist analysis added a crucial socio-legal perspective to what existing internal-interpretational tort law analysis has to offer in like cases.[66] Feminist analysis further enables drawing a line between the myriad appearances of a singular oppressive method—treating the quest for compensation as a quest for prostitution sponsorship—and between different oppressive practices held against women within the legal system.[67] Additionally, the implementation of a feminist analysis managed to penetrate one of the most basic principles of tort law: restoring the tort victims to their previous position. This acknowledgement was also expressed in the amount of compensation that the court eventually awarded to the plaintiff, which the court reduced by a third and limited it to financial damage that included medicinal and psychological treatment of his sexual disability.[68] In this way, the court used feminist analysis as a tool for reshaping the limits of tort law in a sphere where the prevalent and almost tabooed legal maxim was never challenged before.

3. The Endorsement of New Lawsuits While Using Traditional Torts

One of the simplest arguments against the feminist analysis of tort law is that, while it smears tort law for estranging women, the fact remains that

65. HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶ 22.

66. To validate my analysis of Justice Rivlin's denial of the compensation as composed of two distinctive views, see the restricted consent clause that Chief Justice Barak proposed at the end of the verdict, where he asked to join only the first formal-interpretive version Justice Rivlin proposed. In contrast, Justice Beinisch, who reputedly used to be in strong favor of feminist analysis, made it clear that she joined Justice Rivlin's second argument, and even declared it to be "proper judicial policy," which she demanded the lower courts to adopt. HCJ 11152/04 Pedro v. Migdal Insurance Ltd.

67. Zvi Trigger used feminist analysis of this case to correlate the quest for prostitution sponsorship with the inferior status of women in Israeli socio-legal sphere, where in some respects, women are utterly perceived as part of men's property. Zvi Trigger, *Israeli Legal System is One: Family Law and Women Trafficking in Israel as Belonging to a Singular Continuum*, *in* THE DALIA DORNER BOOK 363 (2009).

68. HCJ 11152/04 Pedro v. Migdal Insurance Ltd., ¶ 15 (Justice Rivlin):

> There is room to order compensation for loss to a plaintiff whose ability to have sexual relations has been harmed, when the use of a drug or a meeting with a doctor, psychologist or psychiatrist (and even, perhaps, a sexual surrogate—as we said, we are not expressing an opinion on this matter) may help him to improve his condition. However, beyond that, it seems that the remedy that tort law is offering to rectify this type of damage is without a purpose. It is doubtful if you can categorize escort services as a corrective relief measured against the loss involved in the loss of the ability to have sexual relations. You cannot compare a sexual encounter with a call-girl to the remedy of a medicine or a meeting with a psychologist, for example, for the latter—the medicine and the meeting with the psychologist—have a clear evidence-based purpose of therapy or rehabilitation, and therefore, are part of the recognized index of monetary damages.

women have rarely initiated actions using classic and simple torts, which could easily be used to serve them. In Israel, tort law was almost never used as an independent cause of action to seek recourse for the widespread violence against women, even under obvious frameworks, such as the crime of assault.[69] Similar scarcity of "feminine lawsuits" is apparent also in the United States.[70] This reality could imply that the problem does not lie within tort law's androcentric nature, but rather within women themselves, who, due to some sort of cultural process external to tort law, decide not to utilize it to seek recourse for their suffering. This argument is most challenging when tort claims are absent in arenas controlled by typical harmful feminine life experiences, such as gender-driven violence.[71] And indeed, ample reasons for this circumstance can be offered that are external to tort law's inherent limited accessibility to women and to its unsuitability to their needs.[72] Nevertheless, it is important to point out that despite the number of

69. This statement is excepted by the small, but existing, usage of civil suits as incidental to deciding upon a criminal procedure and following it as part of the criminal procedure, by virtue of article 77A of The Law of the Courts. The Law of the Courts [Consolidated Version], 5744-1984, SH No.1123 p.198 (Isr.). These accompanying claims, however, do not allow a substantive discussion of tort law, but narrow the discussion to the question of assessing the crime victim's harm and its compensation rate. Another tort-like measure for compensating victims of criminal offenses is provided by article 77(a) to the Penal Code, 5737-1977, SH No. 864 p.226 (Isr.), which enables ordering the convict to pay compensation to the victim in criminal proceedings. However, this provision, was identified by the supreme court as criminal and not tortbased; and, in the rare cases it is applied by courts, it normally yields fairly symbolic amounts of compensation which cannot realistically provide reparation to the victims. CA 2976/01 Assaf v. The State of Israel, 56(3) PD 418, 433–438 [2002] (Isr.). Previous research from 2005 revealed that the average compensation sum ordered by courts under this mechanism was 5,000 IS. *See* YIFAT BITTON, RE-READING TORT LAW FROM A FEMINIST-EGALITARIAN PERSPECTIVE 302 (Dissertation, submitted to the Hebrew University Senate, 2005) (Hebrew). For the sake of proportionality, one should bear in mind that the statute itself arms the court with the power to grant up to approximately 250,000 IS for every criminal count. *See* article 77(a) of The Penal Code, 5737-1977, SH No. 864 p. 226 (Isr.). The up–to-date sum is expected to be somewhat higher, as more awareness regarding the importance of this mechanism has been raised through feminist lobby.

70. Research conducted in the U.S. reveals a significantly low level of usage of tort claims by women victims of sexual attacks. *See* Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 155 (2005).

71. Making this distinction between sexual violence and gender violence, I intend to separate two types of violence that are often, but not always, closely tied to each other: gender violence stems from gender power relations. It serves and reflects them at the same time, and does not necessarily have to be attached to sexual assault. For example, a woman who is murdered by a spouse is a victim of gender violence. Sexual violence, on the other hand, though also stemming from gender power relations, focuses on sexual assault or is sexual in the manner in which it is carried out.

72. It is common to use external explanations of tort law, such as the claim of lack of solvency of the defendant, or alternative mechanisms to receive compensation, like a derived civil suit. These arguments seem to me to be weak, and it is difficult to explain the total lack of these claims from the perspective of our legal system. For further explanations, *see* Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 543 (1992). Scherer believes that the reason for the lack of such claims is lawyers' lack of understanding of the potential embedded in tort law and their fear that immunities exist, which would prevent such claims being successful. *Id.*

hypothetical suggestions to explain this phenomenon, researchers have categorically proven women's lack of access to tort law, as it stands today, in a manner that can be reasonably assumed to have direct bearing on women's non-usage of tort claims.[73] For example, it has been argued that even for the most seemingly straightforward tort transgressions that supposedly lack a gender context or bias, like assault and battery, the construction of this tort limits women's ability to use it to compensate them for sexual assault that did not consist of constant physical harm.[74] Other researchers pointed out the masculine manner in which the notion of foreseeability is construed, thereby excluding feminine experience from the ambit of tort law's protection.[75] Different research demonstrated that the mental damage that characterizes women who have been sexually assaulted is completely misunderstood, and consequently is rarely recognized, and only merits low quantities of compensation.[76] One researcher even claimed that the inaptness of tort law to protect women warrants instituting mandatory insurance systems to protect them from violence.[77]

One of the ways to break the tradition of absence of tort cases is to file "feminine" lawsuits that would challenge the boundaries of tort law and allow its development in order to afford women adequate protection under its auspices. Parallel to the conceptual development tort law has undergone from a theoretical feminine perspective, and to complement the process, it became necessary to affect the process "on the ground" by filing suits in traditional areas of tort law, to fully assess their ability to accommodate feminine claims.[78] This bottom-up work was designed to ensure that female victims of violence could overcome their aversion to the legal process as a formal male-oriented means of minimizing their suffering and reducing their personal experience into a cold-minded monetary calculus. The aim instead was to transform this fearful experience into a series of robust legal arguments that would result in a monetary award to be used for their overall rehabilitation. As this experience unfolded, it became clearer that women did not demonstrate reluctance to use tort law for no reason; rather, the courts were reluctant to give them an appropriate recourse for their suits. Under

73. *See generally* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999).

74. *See generally* Joanne Conaghan, *Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment*, 16 OXFORD J. LEGAL STUD. 407 (1996). Tort law's inability to protect against such injury is further discussed in CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 74–164 (1979).

75. Bender & Lawrence, *supra* note 24.

76. Bitton, *Dignity Aches*, *supra* note 30.

77. Wriggins, *supra* note 70. Clearly one can think of this criticism from the opposite perspective, which says that the existence of lawsuits might encourage the insurance companies. However, the author's criticism is about the non-adoption of such mandatory social insurance for this purpose. *See id.*

78. I further elaborate on this phenomenon as typical to feminist work in tort law *infra*, Section 2.3.

this understanding, an appropriate recourse does not just mean a verdict that awards compensation to a female plaintiff; it also involves a decision that considers the complexity that sexual assault requires and compensates its comprehensive harm.

The series of *Mizrahi* cases can be used to exemplify this apprehension of sexual assault victime-plaintiffs.[79] The event giving rise to the cases involved the appalling gang rape of a woman by seven men over the course of three days.[80] The assault took place in an isolated area, while watchdogs stood guard at the entrance to prevent the woman from running away.[81] The continuous rape was only brought to an end when the rapists discovered the woman was suffering from severe and dangerous bleeding.[82] Fearing that their victim would die from loss of blood, the men transported the woman to a nearby hospital, where they left her bleeding outside the emergency room entrance. Upon the culmination of the criminal proceedings with the conviction of all predators, the woman sought the assistance of a renowned feminist legal non-governmental organization (NGO) to file a tort lawsuit against them.[83] The lawsuit was thus filed with deliberate use of feminist legal language, but the judgment failed nevertheless to reflect this, yielding a decision in which tort law remained substantially estranged from typical female suffering. In its short decision, only three paragraphs long, the district court ordered the rapists to compensate the plaintiff with a sum of 460,000 NIS, which represented merely ten percent of the total amount that she initially sought.[84] The semantic of the judgment was typical of classic monetary verdicts; it simply stated that the plaintiff was entitled to be compensated for injuries she sustained at the hands of the defendants, as estimated by the court. The unusual facts of the case, as well as any recognition that it represented a rare application of tort law, were completely absent. Indeed, the judgment simply dealt with a "plaintiff" and seven "defendants," with "medical costs, pain and suffering," and nothing more. Structure-wise, the decision started with a fairly insipid two-paragraph opening, followed by an unanimated third and final paragraph, whereby the damage components were enumerated. It laconically stated: "Therefore, in accordance with . . . [statutory Israeli law of procedure] and based on the plaintiff's affidavit, we order: defendants 1-5 will pay the plaintiff, jointly and severally, the following amounts."[85] Notwithstanding holding the defendants liable, the court awarded 180,000 NIS in relation to the plaintiff's

79. CC (Hi) 209/05 Jane Doe v. Mizrahi (Oct. 24, 2006), Nevo Legal Database (by subscription) (Isr.).

80. CC (Hi) 313/02 State of Israel v. Mizrahi (March 23, 2004) p. 2, Nevo Legal Database (by subscription) (Isr.).

81. *Id.* at 3.

82. *Id*.

83. *Id*. at 2.

84. *Id*.

85. *Id*.

pain and suffering, which amounted to less than half the amount she sought for this head of damage.[86] Most notably, the court completely ignored the plaintiff's invocation of punitive damages, a legal construct designed to express the disgust of a civilized society at abhorrent behavior, particularly in cases of rape and sexual abuse.[87] In sum, the judgment in *Mizrahi* appeared very similar to one that would arise out of a personal injury case involving a car accident, medical negligence, or a negligently created hole in a sidewalk.[88] It was formulated as a payment order of accountability and not as an order of responsibility elaborating its socio-legal justifications and components. The judgment served as an important lesson. In its meager framing, it exposed the risk of using tort law to carry out the feminist agenda: namely, the risk that the capitalist framework within which tort law functions will produce "capitalist decisions." The danger is that the court will write a verdict that solely concerns a monetary award from the defendant to the plaintiff, just like it would do in any other liability suit, in a manner that projects no respect to the plaintiff's suffering and sheds no light on her unique situation. Instead, these cases warrant adapting tort law doctrines to the particularities of the feminine experience. For this reason, the judgment was appealed, and the Supreme Court was asked to reconsider its laconic nature and low monetary value.[89] Accepting the appeal, the Supreme Court confirmed that a tort judgment in sexual assault cases should contextualize the incident under which it was determined, and the case was remanded to the district court for reevaluation.[90] Only then was the hoped-for judgment given: The district court detailed the facts of the rape, described the ordeal of the plaintiff, and, as a result, established significant damages from the rape.[91] The court awarded 1,325,000 NIS to the plaintiff in damages, with the lion's share of it being of punitive nature.[92] Through demonstrating awareness of feminist issues central to the case, the new judgment exemplified the potential of tort law to raise women's awareness of their right to seek compensation for injuries suffered due to sexual abuse. Indeed, the case has turned into a cornerstone of women's appeals for compensation for sexual abuse.[93]

86. CC (Hi) 313/02 State of Israel v. Mizrahi at 2.

87. For the special importance of compensation beyond the specific harm of plaintiffs victims of sexual assault, *see generally* Tsachi Keren-Paz, AT v. Dulghieru—*Compensation for Victims of Trafficking, but Where Is the Restitution?*, 18 TORTS L. J. 87 (2010).

88. Ironically enough, one might assume that had a car accident been the circumstance in which the injury evolved, the verdict would have been more detailed.

89. HCJ 10506/06 Jane Doe v. Mizrahi (March 24, 2008), Nevo Legal Database (by subscription) (Isr.).

90. *Id.* Though the court refrained from directly addressing the appeal's feminist contentions, it nevertheless reversed the anti-feminist verdict of the district court.

91. CC (Hi) 209/05 Jane Doe v. Mizrahi (May 1, 2008) ¶¶ 4–11, Nevo Legal Database (by subscription) (Isr.).

92. CC (Hi) 209/05 Jane Doe v. Mizrahi ¶ 12–13.

93. In addition to it being used by feminist lawyers in drafting claims, courts, too, cite this case for reference. *See, e.g.*, CC (Hi) 518/07 Jane Doe v. John Doe (May 14, 2009), Nevo

Converse examples to the previous case are harder, yet not impossible to find. The case of Jane Doe[94] manifests the great potential feminist approach holds for women plaintiffs suffering from sexual abuse. Jane, a victim of sex trafficking, filed a suit invoking various innovative legal grounds for compensation, including: breach of statutory duty in relation to the illegal trafficking; false imprisonment in relation to her forced detention; fraud in relation to the manner in which she was deceived into coming to Israel for "employment" purposes; and conversion in relation to the funds received from clients paying her for sexual intercourse, which her captors unlawfully kept.[95] The ruling of the district court was saturated with feminist accounts. The court accepted most claims and granted the plaintiff 250,000 NIS for her non-pecuniary losses and additional 50,000 NIS as punitive damages.[96] The revolutionary nature of the verdict was not founded upon some novel application of tort law,[97] but rather in the overtly feminist language the court used to reach its decision, which referred in depth to the factual and social context under which the transgressions occurred as means to better understand the tortious nature of the harm:[98]

> Human trafficking of people to be used as prostitutes is more serious than trafficking of other occupations that are legal, since it is illegal and unethical work which treats a woman as a body without a soul, whose sole purpose is to satisfy the sexual needs of men, with the goal of enriching the trafficker.[99]

The clear feminist discourse the court employed was used to impose tort liability and award damages to the defendant even under the extreme circumstances of the case, in which the plaintiff could not attend a single hearing and thus rendered direct proof of her personal harms impossible.[100]

Legal Database (by subscription) (Isr.). The decision is also presented on the websites of the Israeli rape crisis center as well as in other feminist nonprofit organizations as an incentive to initiate tort proceedings against sexual offenders.

94. CC (TA) 2191/02 Jane Doe v. John Doe (Mar. 8, 2006), Nevo Legal Database (by subscription) (Isr.).

95. *Id.* at 5.

96. The amount related to the plaintiff's intangible injury alone and was considered a fairly high sum, under Israeli standards for such injuries.

97. The court accepted the claim on the grounds of breach of statutory duty and false imprisonment, while rejecting the ground of conversion, which was derived of the fact that the plaintiff had been deprived of funds she made out of her prostitution. The court held that "the plaintiff is not entitled under the framework of this suit to claim conversion as she defined it, since it is a disguised claim that is essentially claim for wages." *Id.* at 11. In Israel, claims relating to employment (regrettably, the court related to trafficking as such) are permitted to be adjudicated only in labor courts. *Id*. at 9. An interesting question is whether Jane Doe's claim would still have been rejected had she re-conceptualized her claim as unjust enrichment.

98. Contextual reading of legal issues is a feminist imperative. *See generally* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990). Likewise, its importance to rereading tort law is clear. *See* Bitton, *Foreseeability of Harm*, *supra* note 29.

99. CC (Hi) 518/07 Jane Doe v. John Doe at 14.

100. *Id*. at 14–15.

The court defended its decision to nevertheless compensate the plaintiff by referring to the unique Israeli phenomenon, where trafficked women were deported from the country upon the culmination of the criminal trial of their traffickers and therefore did not have the opportunity to seek compensation for their suffering through a civil suit.[101] The concerned judge argued that her decision would ensure such plaintiffs could receive the compensation to which they were entitled even though they were barred from attending civil proceedings pursuant to lengthy criminal proceedings.[102] Instead, she emphasized that the authority judges have to use their discretion to assess, at large, the amount of compensation awarded to the absent victim, using information from studies and general findings about the damages female victims of sexual violence incur. The Supreme Court affirmed the verdict, despite the tortious difficulties it bore.[103]

B. EXPANSIONS OF TORT LAW'S BOUNDARIES BY FEMINIST ANALYSIS

The central influence on tort law that feminist analysis brought about is the expansion of the limits of its application. Feminist analysis was not limited to altering tort law's internal mechanisms' functions, but also reshaped its boundaries by expanding its orbit of protection to include women's suffering as well as other minority groups' experiences, which traditionally fell outside the orbit of the law's protection. This section will illustrate this process of expansion.

1. Doctrinal Expansion Into Areas of "New Injustices"

Unlike the feminist mainstreaming process described above, which allowed a "natural" shift inside tort law's boundaries, the change I will describe below occurred against the notion of accepting "mainstream." Indeed, it expanded the recognized boundaries of protection that tort law afforded to typical women's interests, thus demonstrating that the strategic wave of feminine-feminist lawsuits washing the shores of courts caused not only a practical change, but also a conceptual shift in tort law. Though this change is normally presented in courts' rhetoric as part of the law's continued comprehensive approach to protect women's interests, the expansion of tort law's boundaries in actuality is a true innovation, not

101. CC (Hi) 518/07 Jane Doe v. John Doe at 11–12.

102. *Id*., ¶¶ 13–14. Under the Israeli legal system, pursuing civil claims only after a verdict is rendered in related criminal proceedings is more effective due to certain procedural and evidentiary benefits. These benefits stem from article 77A of the Law of the Courts [Consolidated Version], 5744-1984, SH No. 1123 p. 198 (Isr.), which allows the administration of a tort claim pursuant to criminal conviction, and article 42A of Evidence Law [New Version], 5731-1971, 18 LSI 421 (1971) (Isr.), which allows the use of facts which were proven during the criminal sentencing to be admitted for purposes of determining fault in the civil proceedings.

103. HCJ 3806/06 John Doe v. Jane Doe (May 26, 2009), Nevo Legal Database (by subscription) (Isr.). *See particularly* ¶ 5.

introduced under tort law's liability regime before. An illuminating example in this area, which began to take root in courts a decade ago, is the tort claims of women whose recalcitrant spouses denied them a divorce, and the women in turn sued them for compensation.[104]

In order to best comprehend the magnitude of this feminist achievement, one needs basic familiarization with Israel's Jewish divorce system. Religion exposes a Jewish woman to the risk of suffering from a "recalcitrant husband"—a Jewish husband who refuses to release a divorce warrant to his wife. Though facially seeming to be a "religious problem," this phenomenon is particularly acute and distinctively "legal" since, in Israel, Jewish tradition is closely intertwined with otherwise generally secular state laws, in a manner quintessential to a mixed, religious-secular legal system.[105] Israeli family law prescribes the application of ancient Jewish law on Israeli Jews by religious courts, thereby subjecting women to discriminatory religious practices. Particularly harmful is the inequality of Jewish divorce law, where completion of divorce proceedings is uniquely conditional upon the husband's agreement to give his wife a writ. Husbands often use this unequal disposition to exploit their power to extort financial and custodial concessions from their wives during divorce discussions or to simply prevent the wife from remarrying. A tortious perspective on these circumstances offers a platform for compelling the man to pay for not granting the writ based on the unreasonable manner of his refusal.[106]

The claims of women denied a divorce relied on both existing legislation and case law in the realm of the right to autonomy, and therefore may be interpreted as a natural development thereof. In the context of the abridgement of individual autonomy, lower courts have used the liability standard the supreme court first imposed in the case of *Da'aka v. Carmel Hospital*[107] as strong conceptual support of women who are refused a divorce

104. See the following seminal judgments on this issue: CC (Jer) 3950/00 Jane Doe v. John Doe (2001), Nevo Legal Database (by subscription) (Isr.); CC (Jer) 19270/03 K.S. v. K.P. (2004), Nevo Legal Database (by subscription) (Isr.); and CC (Kfar-Saba) 19480/05 Jane Doe v. Estate of John Doe (2006), Nevo Legal Database (by subscription) (Isr.).

105. The secular Israeli legal system has incorporated Jewish law as mandating marriage and divorce of Israeli Jews, granting sole jurisdiction over these matters to the state rabbinical courts and subject to the religious Jewish rulings. Rabbinical Court Law (Marriage and Divorce), 5713-1953, 7 LSI 139 (1953–1954) (Isr.).

106. *See generally* Benjamin Shmueli, *Civil Actions for Acts that Are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Laws*, 46 VAND. J. TRANSNAT'L L. 823 (2013); Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333 (2012).

107. HCJ 2781/93 Da'aka v. Carmel Hospital 53(4) PD 526 [1999] (Isr.). However useful at first glance, the reliance on *Da'aka* as authority for awarding damages to women who are being denied a divorce, is limited. In *Da'aka*, the compensation was awarded for injury to the plaintiff's autonomy, which reflected a symbolic rather than actual consequential damage sustained, by her. *Id*. at 573–77. Similarly, women being denied a divorce are in the same position, since they do suffer actual consequential damage upon their partners' refusal to grant them a divorce. Tsachi Keren-Paz, for instance, argues that invoking *Da'aka* may reduce the

writ, as it affirms the individual's right to autonomy she was denied with regards to whether or not to be married. Legal counts such as breach of statutory duty and negligence were joined together to form the basis of this tort entitlement.[108] Courts identified refusal of a husband to warrant a divorce writ as constituting a civil wrong, since it violates a woman's autonomy, inhibits her ability to determine issues central to her future, and prevents her from fulfilling her existence as a free individual.[109] In doing so, courts constrained the boundaries of male dominance that is permitted under the auspices of religious law, and de-legitimized this dominance over women by providing the latter with recourse for its harmful consequences in the civil system. Interestingly, the issue of women who are refused a divorce writ has been already brought before the supreme court under a tort claim almost two decades prior to the current claims outbreak: the case of *Sohan*[110] considered the harm inflicted upon a woman whose recalcitrant husband managed to escape Israel due to the negligence of Israeli Immigration Police, and left her forever trapped in an unwanted marriage.[111] Notwithstanding its tight relation to feminine life experience, *Sohan*, however, was not adjudicated upon any such context, and had no authority over cases of similarly situated women who won their tort claims. Moreover, it took potential plaintiffs, as well as courts, one-and-a-half decades to consider this oppressive gender-based practice as having compensatory implications. However, the recent court rulings on this matter indicate an open and clear willingness to recognize women's suffering in this situation as intolerable and act to end it. Women also react accordingly by filing more and more of these lawsuits and thus putting more trust in the courts.

Two Israeli feminist analysts, Tsachi Keren-Paz and Naomi Levenkron, recently developed another paradigm for commonplace wrongs to apply to defend "newly recognized" women's suffering. The pair recommended imposing strict liability on customers of brothels for the sexual services they purchase from women in the sex trafficking industry.[112] Keren-Paz and Levenkron's position is based on the re-conceptualization of the element of

amount of compensation granted to women who are denied a divorce and undermine the overarching goal of affording them redress. *See generally* Tsachi Keren-Paz, *Compensation for Infringement of Autonomy: A Normative Assessment, Current Developments and Future Trends*, 11 HAMISHPAT 187 (2007) (Hebrew).

108. CC (Jer) 3950/00 Jane Doe v. John Doe (Jan. 23, 2001) 34, Nevo Legal Database (by subscription) (Isr.). In this sense, the court clarified that even after a divorce had already been granted, this does not prevent the woman from seeking compensation for past damages she incurred while she was being denied it. *Id.* at 37.

109. To this end the court relies on various sources such as Jewish ancient law and family law rules.

110. HCJ 429/82 State of Israel v. Sohan 42(3) PD 733 [1988] (Isr.). For a detailed analysis of the judgment in *Sohan* and whether it constitutes an apt analysis for cases of divorce-denied women, see Bitton, *Power Relations*, *supra* note 32, at 174–76.

111. HCJ 429/82 State of Israel v. Sohan 42(3) PD, at 734.

112. *See generally* Tsachi Keren-Paz & Nomi Levenkron, *Clients' Strict Liability Towards Victims of Sex-Trafficking*, 29 LEGAL STUD. 438 (2009).

consent in the tort of assault within the context of sex trafficking, and attests to the lack of agreement, either real or constructive, in these circumstances.[113] In another article, Keren-Paz proposed treating "customers'" use of women's bodies in brothels as a tort of conversion.[114] His innovative argument is that women have a right to not be objectified, which is part of their property right over their own bodies.[115] This right is abridged each time a customer commits sexual acts with a prostitute, who is held to lack true consent for selling her body, in a manner satisfying the components of the tort of conversion.[116] These important theoretical and doctrinal developments, though yet to be implemented in practice, lay the infrastructure required to realizing the full potential embedded in current Israeli tort law to recognize new "injustices" through reviving traditional and neglected wrongs, and extend tort law's protection to women who need it.

2. Expanding the Categories of Protection to Other Disadvantaged Groups

An important and systemic virtue of feminist analysis is its applicability for the betterment of other minority groups. Indeed, feminist theory does not limit itself to women or women's issues; one of its strengths lies in its broad conceptual critique of inequality, which can be used as a basis for any minority group suffering from social subordination.[117] This diverse application of feminist analysis is what brought it prominence and distinctiveness in the legal discourse.[118]

The diverse applications of feminist analysis, which are evident in tort law as well, demonstrate its importance. An example of this trait is, again, the Sexual Harassment Prevention Act. While most sexual harassment is targeted at women, the law does not neglect forms of sexual harassment members of other minority communities suffer. The LGBT population, known for being often harassed for its members' sexual lifestyle, is also entitled to direct protection under the Act's Article III, which prohibits sexual harassment based on "sexual orientation."[119] Moreover, people whose sexual orientation is heterosexual, but whose sexual identity is ambiguous or subject to change, are also protected by the Act.[120] It is interesting to observe how the protection of the LGBT community pursuant to feminist struggles expanded to other areas as well. Pursuant to its

113. Levenkron, *supra* note 112, at 438–39.

114. *See generally* Tsachi Keren-Paz, *Poetic Justice: Why Sex-Slaves Should Be Allowed to Sue Ignorant Clients in Conversion*, 29 L. & PHIL. 307 (2010).

115. *Id*.

116. *Id*.

117. Bitton, *Power Relations*, *supra* note 32, at 150–52.

118. *See* Fiss, *supra* note 22. Fiss advocates the importance of feminist theory.

119. Sexual Harassment Prevention Act, 5748-1998, SH No. 1661 p. 166 (Isr.), article 3(5).

120. *Id*. Additional to protecting against sexual harassment based on "sexual orientation," article 3(5) provides protection against "degrading or humiliating behavior towards a person" based on his/her "sexuality."

protection under the Sexual Harassment Prevention Act, the LGBT community obtained further social shield—this time against defamation—under the Israeli Defamation Law.[121]

In another progressive move, courts turned the tools developed through feminist analysis to combat gender-based inequalities into means to protect male plaintiffs.[122] In a recent ruling, the court awarded compensation to a man whose wife refused to give him a divorce writ. This phenomenon—which I consider problematic when occurring outside the context of gender-based power relations—further indicates the importance of using tort law to provide qualitative protection to the rights of both men and women, whenever they become victims of gender power relations.[123]

3. Expanding Protection Patterns of Negligence Law

121. Defamation Act, 5725-1965, SH No. 464 p. 240 (Isr.), article 1. The original defamation statute did not include a prohibition against degrading a person on grounds of their "sexual orientation," and only on February 28, 1997, did the Knesset pass an amendment which defined libel as any publication which is likely to "degrade a person based on race, national origin, religion, place of residence, gender, *or sexual orientation*." *Id*. (emphasis added). Regardless of its clear benefit, criticism has been raised against the application of this tort by courts as a means to reinforce homosexual identity as shaming and degrading. *See generally* Heddy Vitarbo, *Heterosexuality crisis: Constructing Sexual Identity in the Laws of Libel* 33 IYUNEY MISHPAT 5 (2010) (Hebrew).

122. CC (Jer) 21162/07 John Doe v. Jane Doe (2010), Nevo Legal Database (by subscription) (Isr.).

123. It is my position that tort law is intended to protect *all* people who suffer from unacceptable social phenomena, and in this case, a phenomenon originating from gender power relations. At the same time, it is important that such use of tort law take into account the unique facts of the case, in light of the general social power relations under which they are evaluated. For example, in *John Doe*, the judge makes it clear that the woman exercised her power not to grant her husband a divorce due to his repudiation of her economic rights in the Rabbinical Court. *Id.* If this is the case, then it is questionable whether the woman's behavior was unreasonable and negligent in trying to alleviate the harm incurred by her in the Rabbinical Court. These considerations can also affect her right to argue exemption of liability based on defenses like assumption of risk or contributory negligence on her husband's part. The court's abstention from discussing the woman's claim in depth on the one hand, and his disregard for the fact that the husband was issued unique Rabbinical permission (also known as "permission of 100 Rabbis") to remarry against his wife's will on the other, are very disturbing, and seem to misuse the feminist theory upon which this unique claim was developed. Moreover, given the obvious disparity in gender power relations and the different harms resulting in cases where it is the woman who refuses to grant a divorce to the man, it would be appropriate for the court to take these dissimilarities into account when assessing the harm incurred by the plaintiff. For example, a man being refused a divorce may be permitted to wed another woman despite his reluctant partner (as was shown in this case), whereas a woman remains married for life and suffers the serious consequences, both from a legal and a social perspective. This phenomenon and its hideousness has been repeatedly discussed by the Supreme Court. *See*, *e.g.*, HCJ 6751/04 Sabag v. Great Rabbinical Court of Appeals 59(4) PD 817 [2004] (Isr.); HCJ 2123/08 John Doe v. Jane Doe 62(4) PD 1, 13–17 [2008] (Isr.). For further critique, *see generally* A. Strum, *Jewish Divorce: What Can the Civil Courts Do?*, 7 AUST. J. OF FAM. L. 225 (1993); Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389 (1985).

A notable aspect of the tort of negligence is the flexibility of its elements, used as a basis to expand or constrain its scope of application.[124] The "duty" element is traditionally considered the primary outlet for expressive policy considerations dictating the scope of negligence law. Indeed, it was through the use of this element that common law courts objected to the expansion of tort liability to include peripheral tortfeasors.[125] A peripheral tortfeasor, in contrast to a direct tortfeasor, is one whose contribution to the harm is indirect and collateral and who is therefore neither the direct nor the primary cause of the damage. Though tort law recognizes peripheral tortfeasors in principle, traditionally the courts have expressed strong preference for imposing liability on direct tortfeasors.[126] This predisposition has had a harmful impact on women as their lives are carried out within the framework of power relations, thereby rendering them more vulnerable to two systematic risks.[127] The first is the risk of sustaining direct injury caused by a tortfeasor who bears power surplus over the woman. The second risk is that of getting injured from the direct implications of the gendered power relations as a consequence of a peripheral party's act or omission which facilitates the direct harmful act or extends its duration or magnitude.[128] Though entailed by a systematic framework of power relations, the latter risk is nevertheless indirect and therefore defined as peripheral under tort law.[129] This distinction can be illustrated with two examples pertaining to typical feminine life experiences. The first example concerns the case of "N," who was four years old when she was first sent to the municipal social services for psychological assessment, after her kindergarten teacher suspected that the child had been molested at home.[130] Indeed, the psychologist who evaluated the child's condition defined her behavior as indicative of "pathological patterns of sexual behavior [performed] by her father."[131] Despite this alarming observation, the municipal authorities neglected to

124. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 270–72 (2006) (for U.S. tort law); Israel Gilead, *The Foundations of the Negligence Tort in Israeli Law*, 14 IYUNEY MISHPAT 319, 328, 338 (1988) (Hebrew) (for Israeli tort law).

125. *See generally* Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 LAW Q. REV. 249 (1991).

126. The notion of peripheral liability is introduced by Jane Stapleton, in her chapter *In Restraint of Tort*, *in* 2 THE FRONTIERS OF LIABILITY 83, 85 (Peter Birks ed., 1994). The writ system—which died, but haunts us from the grave, as the famous tort idiom states—has direct bearing on tort law analysis' reluctance to recognize indirect causes of harm as liable to it. GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 27–29, 37–53 (2008).

127. *See* Bitton, *Power Relations*, *supra* note 32, at 172–79.

128. A prominent example of such facilitation would be the police, neglecting to protect a woman from a man who threatens to harm her. *See* Bitton, *Power Relations*, *supra* note 32, at 177–79.

129. Bitton, *Power Relations*, *supra* note 32, at 172–79.

130. The facts presented here are taken from the case of 4867/99 *Jane Doe v. The Ministry of Social Welfare* (2010) (Isr.) (unpublished). The case, where the author represented the plaintiff, was settled outside the court in 2010.

131. *Id.*

react professionally, and decided to abort N's case.[132] Eight long years later, when N was hospitalized following her first suicide attempt, her medical team became aware of the sexual abuse she suffered at the hands of her father and reported it to the police.[133] The police opened an investigation but closed it soon after, citing "lack of cooperation" by N's family as the reason for its intransigent act. It took four more years and several other suicide attempts for the police to reinstate the investigation, which revealed that N's father sexually molested her throughout her entire life.[134] He was eventually convicted of sexual assault.[135] The father in this case was the direct injurious perpetrator who exploited the gender-power relationship between him and his daughter through the mechanism of incest. By failing to act on N's behalf, the municipal entities and police officers neglected their duty to identify the catastrophe and allowed it to linger, thereby demonstrating systematic failure to protect females against the risks social gendered power relations inflict upon them. In N's case, establishing a viable tort claim against her father as a direct tortfeasor is simple. However, the efficacy of such a claim is limited. Secondary to a criminal ban on incest, civil claims brought against molesting fathers bear only moderate effect on abolishing the phenomenon altogether. Ironically, while the imposition of tort liability on public bodies will likely have significant aptitude to prevent, or at least reduce, the magnitude of the phenomenon, such liability is substantially more difficult to impose under negligence law.[136] Extending liability to peripheral tortfeasors is thus a project of crucial importance to feminist analysis of tort law.

The notion of establishing "social" and more peripheral liability to protect women against the harms befalling them is not limited to government entities. Due to the capitalist nature of society, companies pervade the public area of life, and the classic liberal account they hold as private entities does not shield them from liability that carries public meaning. Demonstrative of this understanding is the recent case of *Beitili*,[137] whereby the court imposed liability on the privately owned company Beitili, a successful chain of home design stores, to compensate the estate of Tamar Brez, a woman who was raped and murdered in 1997 on the roof of Beitili's flagship store's premises.[138] Tamar went to the shop in search of home furniture.[139] There,

132. 4867/99 *Jane Doe v. The Ministry of Social Welfare*.
133. *Id*.
134. *Id*.
135. CC (Hi) 319/99 People v. Shwartz, (Jan. 29, 2001) (unpublished) (Isr.). Outrageously, the father was sentenced, in a plea bargain, to two years imprisonment, out of which one year was on parole. *Id*., ¶ 4.
136. The reasons for this difficulty are elaborated in Bitton, *Liability of Bias*, *supra* note 3, at 83–85.
137. CC (TA) 2271/04 Brez v. Beitili Ltd., (Apr. 7, 2010), Nevo Legal Database (by subscription) (Isr.).
138. *Id*. at 3.
139. *Id*.

store personnel directed her to the top-floor display, which was an isolated area of the store.[140] Confident in the safety inherent in every business premise that welcomes the public with a security guard at its entrance, Tamar went up to the top floor.[141] However, upon her arrival, an employee who had been lurking behind her attacked her and locked the door to the floor behind her.[142] Undisturbed, he implemented a sadistic, premeditated plan of rape and murder.[143] Note that Tamar's rape and murder occurred because she was a woman. It is also noteworthy that the perpetrator pursued his crime after having searched for months for a site suitable for his vicious plan, as was eventually evident in his own testimony.[144] The plaintiff claimed Beitili, whose main priority as a company was generating fiscal profit, did not create a safe purchasing environment for women, who constitute its lion share of consumers.[145] This outrageous neglect of the company's role to ensure a safe environment for women resonates with the commonly held perception that women alone are required to limit their personal freedom and quality of life in order to reduce their risk of becoming victims of male sexual attack. Paradoxically, although society burdens women with vulnerability to risks due to gender power relations, it is nevertheless women's responsibility alone to shield themselves against the dangers imposed on them by society.[146]

The district court refurnished the "duty" concept to counter this offensive cultural perception. The court's position was that the business owners' category of liability should be expanded to include safety concerns of customers, incentivizing business owners to invest in security measures for shoppers. Although couched in gender-neutral terms, the verdict had far-reaching implications for women. It utilized tort law to shift the responsibility that women have traditionally assumed to ensure their own safety—with which they were burdened due to structural gender power relations—to society as a whole. The judgment revolved around this axis of business owners' responsibility to prevent the risk of creating "secluded spaces" in business premises, thereby reinforcing the case's gender significance, since women alone incur the additional risk of being raped in these secluded spaces.

140. CC (TA) 2271/04 Brez v. Beitili Ltd. at 4.
141. *Id*.
142. *Id*.
143. *Id*. at 4–5.
144. *Id*. at 10.
145. CC (TA) 2271/04 Brez v. Beitili Ltd., 23–26, 35 (Apr. 7, 2010), Nevo Legal Database (by subscription) (Isr.).
146. Beyond shouldering the costs of rape itself, women also incur the costs of preventing it. More to the point, they are put in a contradictory condition, in which they are taught to fear men and at the same time expected to rely on them for protection from other men. ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES 1–2 (1997).

The radiating effect this ruling has on the safety of women as a whole stems not only from the foregoing contentions but also from the case's far-reaching influence. Though the verdict was directed against the specific defendant company, it directly impacted insurance companies across the national business market provide insurance for on-the-premises damages. The court's liability insurance paradigm increases the efficacy of the concept of changing social burdens and responsibilities in relation to injuries women incur. In order to protect their financial interests, insurance companies, under an assumption of simple rational economic calculus, will likely change their safety requirements for business premises as prerequisites for issuing insurance policies.[147] These requirements will change personal safety-assuring patterns of businesses in Israel, and accordingly, influence the allocation of responsibility for women's safety. As such, it may substantially enhance the tort-driven social change initiative introduced by feminist critics of tort law.

Despite its celebrated traits, it is important to note that the verdict's rhetoric did not contain innovative interpretations of tort law, but rather employed conventional analysis. It thus demonstrated that the power to impose liability on peripheral tortfeasors—which bears significant value for identifying entities that facilitate systematic materialization of potential social vulnerability—is embedded in tort law. Here lies the significance of the case in terms of internal tort law: It demonstrates that tort law is suitable for modern social systems under which the evolution of damage may reach far beyond the injured party and the direct tortfeasor, where neither one even knows of the other's existence.[148] Applying this notion to *Beitili*, it can be

147. In *Beitili*, the insurance company was one of Israel's most prominent companies, Migdal Group, which occupies the largest share of the market and insures the majority of private businesses' premises in Israel. CC (TA) 2271/04 Brez v. Beitili Ltd.

148. In Israel, the idea of immunity that absolves the state of tort liability has long been rejected. Civil Torts Act (Liability of the State), 5712-1952, SH No. 109 p. 339 (Isr.). *Reinforced by* HCJ 243/83 Jerusalem Municipality v. Gordon, 39(1) PD 113, 134 [1985] (Isr.). In practice, Israeli courts are substantially more liberal with respect to imposing liability on governmental entities than their Anglo-American counterparts. *See, e.g.*, HCJ 145/80 Vaknin v. Municipal Council, Beit Shemesh, 37(1) PD 113, 122 [1982] (Isr.). In contrast, in England in a case with similar circumstances, Tomlinson v. Congleton Borough Council, [2003] 3 WLR 705 (Eng.), the court indeed recognized a duty of care, but on appeal, the House of Lords reversed, stating that no duty of care lies between the city council and the city's residents. *See* Tomlinson v. Congleton Borough Council, [2004] 1 A.C. 46 (H.L.) (Eng.). Another example is the case of *Sohan*, where Sohan filed a lawsuit against the police for negligent failure to prevent her husband from leaving the country, due to which she remained an *agunah* (a woman bound in marriage under religious law to a husband who refuses to grant a divorce). HCJ 429/82 State of Israel v. Sohan 42(3) PD 733 [1988] (Isr.). Her claim was accepted, and the Supreme Court held that the police owe a duty of care to the public. *Sohan* is surely considered by common law tort law to be a legal mistake or at least, an exception to the common rule. The trend in quite a few English courts is to reduce the liability of public servants working under governmental power. *See* Curran v. Northern Ireland Co-ownership Housing Association Ltd., [1987] A.C. 718, [2 WLR].L. 1043 (N. Ir.); Hill v. Chief Constable of West Yorkshire, [1987] 1 All ER 1173 (Can.). In American law, this has long been the case, even in tremendously horrendous circumstances. *See* Riss v. City

argued that the day the business space of Beitili was designed, minimal security arrangements were made. Long before it opened its doors to the public, Tamar's Berez's rape and murder was determined. Tort law takes us to this preliminary point in the planning phase to identify the determination of Tamar's fate as an injustice.

The abovementioned cases are demonstrative of a larger trend of feminist influence over the boundaries of tort law's protection. Judgments that addressed feminine life experiences reshaped these boundaries as well as tort law's most fundamental concepts. For example, the elements of reasonability, foreseeability, and the causal nexus within negligence law were reconsidered in a case in which a woman committed suicide after enduring continuous suffering at the hands of a violent spouse, whose claim for breach of the causal chain due to his wife's "voluntary" killing was declined by the Court.[149] Another judgment, which compensated a victim of sex trafficking, led to a better understanding of the authority a criminal conviction of the defendant should have on the onus of the plaintiff's satisfaction of tort liability elements, and contributed to the development of the principle of compensation without proof of damage.[150] Principles that had been lost in the recesses of tort history, such as providing aggravated damages,[151] were resurrected as significant compensatory tools for intangible harms in cases of women being denied a divorce and female victims of sexual abuse.[152] Feminist analysis of a case that awarded compensation to a woman whose partner refused to divorce her and was able to flee abroad as a consequence of police negligence demonstrated how the overexpansion of state liability—which was implemented in this case—can be narrowed by using a nuanced reading of the case relevant to women suffering from gender-based abuse.[153] Disempowered women like Huria Sultan, a

of New York, 22 N.Y.2d 579, 240 N.E.2d 860 (1968); Cuffy v. City of New York, 69 N.Y.2d 255, 505 N.E.2d. 937 (1987). Chief Justice Barak was well aware of the progressive stance of his ruling, stating: "It is well known that in matters of negligence this court precedes English case law." HCJ 429/82 State of Israel v. Sohan 42(3) PD at 742.

149. HCJ 7832/00 Yaakobov v. The State of Israel, 56(2) PD 534 [2002] (Isr.). The transformative analysis provided by the Court in this case is presented in Bitton, *Dignity Aches*, *supra* note 30, at 177–79.

150. CC (Hi) 209/05 Jane Doe v. Mizrahi (May 1, 2008), Nevo Legal Database (by subscription) (Isr.).

151. Aggravated damages are intended to express an honest assessment of the damage caused, and are awarded in cases where the damage was intensified following reprehensible behavior of the tortfeasor. GAD TEDESCHI, THE LAW OF CIVIL WRONGS: THE GENERAL PART, 579 (Hebrew University Press, 1976); DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1973). These damages function to provide the primary application of the principle of *restitutio in intgrum*, as opposed to the punishing effect intended by punitive damages which are an exception to this principle. Yehuda Adar, *Touring the Punitive Damages Forest: A Proposed Roadmap*, 1 OSSERVATORIO DI DIRITTO CIVILE E COMMERCIALE [The Civil & Commercial Law Observer] 275, 317 (2012).

152. CC (Jer) 2160/99 L. v. L. (Aug. 31, 2005), Nevo Legal Database (by subscription) (Isr.).

153. Bitton, *supra* note 32, at 176.

Palestinian woman who sought compensation for the divorce her husband carried out against her will, expanded the breach of statutory duty boundaries to include criminal offenses that are designed to regulate social conduct as a whole, as a means to protect a single woman from her husband's injurious coercion.[154] A man whose sexual competence was harmed in a car accident yielded the Court's first questioning as to the sanctity of the *restitutio in integrum* principle perceived to be the underlying pillar of common law torts.[155] At this stage, it is sufficient to pinpoint these cases as signifying the great potential embedded in feminist analysis of tort law to question tort law's traditional boundaries and introduce new tools for resetting the boundaries to accommodate the changing modern, as well as liberal, needs of society.

C. RESHAPING TORT'S PROCEDURES

The introduction of feminist discourse into the substantive boundaries of tort law required a corresponding development in its procedural boundaries, as is customary with the relationship between legal form and substance. As with any legal-ideological revolution, the change in tort law was subject to a constant risk. Though it recognized an entitlement to compensation pursuant to feminine injuries, procedural elements inhibited the implementation of such entitlement. These difficulties and their corresponding solutions, which were achieved through feminist analysis, will be illustrated using two examples in the following paragraphs. The first example relates to determining the amount of court fees women plaintiffs owe when filing a lawsuit for compensation in sexual abuse cases, and the second relates to the Statute of Limitations effective in these cases.[156]

1. Determining Court Fees for Personal Injury Suit Arising Pursuant to Sexual Assault

Despite the rapid recognition of women's claims, only women who have access to significant funds, or those that enjoy pro-bono representation are able to file lawsuits and manage a trial, primarily due to the mandatory fee arrangement of the Israeli system, which requires court fee for filing any lawsuit. This arrangement determines the amount of the fee as proportionately derived of the amount of the claim filed, and thus serves as a disincentive to file claims for significant sums of money.[157] Invoking the economic-status exemption for this fee hardly solves this difficulty. The

154. HCJ 245/81 Sultan v. Sultan, 38(3) PD 169 [1984] (Isr.).

155. HCJ 11152/04 Pedro v. Migdal Insurance Ltd. 61(3) PD 310 [2006] (Isr.).

156. Though each of these two issues warrants extensive analysis, due to space constraints, reference to them will be brief and will mainly seek to present the potential development that arises from them.

157. Generally, court fees amount to 2.5% of the total sum sought by the plaintiff for compensation, as stipulated in article 6 of the Court Regulations (Fees), 2007, KT 6579, 720 (Isr.).

waiver's highly restrictive criteria and the state's draconian demands to provide extensive evidence of the plaintiff's financial situation sometimes leads to utter despair and abandonment of the claim.[158] A more prudent route for avoiding the fee calculus as a proportion of the sum claimed is instead invoking a very low, flat fee designed for personal injury claims.[159] This format is set to allow better access to those whom the tort framework is intended most to protect—plaintiffs who have incurred bodily injury.[160]

Therefore, a key tool in providing victims of sexual assault with access to tort law is ensuring their claims remain under the category of "personal injury." Ostensibly, this should not pose a challenge, since their damage is clearly bodily damage. However, with the growing number of compensation claims filed in courts, the Israeli Justice Ministry attempted to undermine this basic understanding. In a recent court case, the plaintiff, a victim of sexual assault, was required by the state to pay extremely high court fees after classifying parts of her claim's head of damages as non-bodily, namely, components such as punitive damages and harm to her autonomy.[161] Alternatively, the state advised the plaintiff to withdraw these heads of damages and regain her flat fee eligibility.[162] The state's decision to reclassify the suit was based on a former ruling, given by the Supreme Court, in which it was held that a claim pursuant to false imprisonment of the plaintiff should not be categorized as "personal injury" as long as it pertains to the plaintiff's non-pecuniary heads of damage.[163] The sexually assaulted plaintiff's contention against this stance was that any harm originated from the bodily injury she incurred, and any compensation resulting from this act against her body, fits in the category of "personal injury", as a matter of analytical logic.[164] Moreover, her suggested interpretation better adheres to the rationale underlying the purpose of the flat fee arrangement to ease access

158. Based on my extensive experience with fee waiver processes, in rough evaluation, the prevalent average duration of this preliminary stage is no less than six months.

159. See the latest update to the monetary charge in article 5 to the regulations. *Id*. Note that this arrangement does not apply to the family court, and a woman who wants to sue her husband has to pay a fee according to article 1 of the First Appendix to the Family Court Regulation on Court Fees, 1995, KT 1293 8 (Isr.), in the amount of 1% of the sum sought in the suit, even if it is in relation to personal injury. For further details, *see* HCJ 5027/09 Jane Doe v. Department of Justice [June 2, 2010] Nevo Legal Database (by subscription) (Isr.).

160. The importance of utilizing tort law to protect first and foremost against bodily harm is acknowledged by one of this field's harshest critics. *See generally* Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO. L. REV. 79 (1986).

161. CC (PT) 72/08 Raz v. Ministry of Education (Nov. 12, 2008), Nevo Legal Database (by subscription) (Isr.), ¶ 3.

162. *Id*., ¶ 7.

163. *See* HCJ 5237/06 State of Israel - Courts Administration v. Mansour [July 6, 2008], Nevo Legal Database (by subscription) (Isr.). In brief, I will point out my mind does not rest easy with the court's decision in this case. As a matter of principle, the distinctions made by the court between different types of damages seem artificial and difficult to implement.

164. CC (PT) 72/08 Raz v. Ministry of Education (Nov. 12, 2008), Nevo Legal Database (by subscription) (Isr.), ¶ 3.

to justice for those whose suffering is severe, immediate, and clear.[165] The Magistrates' Court accepted the state's arguments at first, but following an appeal, the decision was reversed, with the higher judge maintaining that the damages sought by the plaintiff all resulted from her physical injuries, as it was the sexual attack over her body that generated them.[166] The district court, which presided over the state's additional appeal, affirmed and used its judgment to express indignation about the state's position on the matter and its persistent representatives who "stood in the way of the respondent and tried to block her entrance through the doors of the court."[167] Aside from its practical importance, the wide scope of this decision—keeping the doors of tort law open to victims of sexual assault everywhere—demonstrates the epistemological importance of recognizing their injury as bodily. With its decision, the court proved it was parting ways from traditional tort doctrines, which afforded less protection to tangible harms, judging them as subjective and therefore difficult to prove and to understand. Instead, this case conferred female victims of sexual attacks, who sustain many tangible harms, with the status of victims of bodily harm. This status is most favorable under tort law and afforded its utmost protection.[168] This "alignment" of injuries has dual significance: it not only formally establishes that sexual assault-induced injuries are typical to female life-experience but are nevertheless recognized under tort law, but also seeks to provide full and effective protection against these harms.

2. Statute of limitations for claims pursuant to domestic violence

According to articles 5 and 6 of the Israeli Statute of Limitations Act, 1958, a tort claim must be filed within seven years of the date of the tortious act resulting in the injury. Article 13 prolongs this period in the case of spousal claims until a divorce has been finalized.[169] However, many female victims of domestic violence find themselves in a state of mental exhaustion following a lifetime of violent terror, and normally, also a battle over the divorce, and are only able to confront their suffering and trauma years later. As such, these women can pass the seven-year threshold set by the law without acquiring sufficient mental resources to bring a tort claim against

165. Purposeful interpretation is highly prevalent in Israeli jurisprudence and is most associated with former Chief Justice Barak. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 129–139 (Princeton University Press, 2005); AHARON BARAK, THE JUDGE IN A DEMOCRACY 125–152 (Princeton University Press, 2008).

166. CC (PT) 72/08 Raz v. Ministry of Education (Nov. 12, 2008), Nevo Legal Database (by subscription) (Isr.).

167. AC (CD) 14624-12/08 Ministry of Education v. Doe (Dec. 28, 2008), Nevo Legal Database (by subscription) (Isr.).

168. Unsatisfactory compensation for sexual assaults has long been a challenge for tort adjudication. *See* Kate Sutherland, *Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault*, *in* TORT THEORY 212, 216–25 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993). This difficulty can be seen as part of a more systematic rejection of the notion of ethereal interests in tort law. Levit, *supra* note 23, at 140–42.

169. Statute of Limitations Act, 5718-1958, SH No. 251 p. 112 (Isr.).

their divorcee.[170] Indeed, it is widely understood that the reason why so few suits of this kind are filed is because it is assumed that they have expired. Such was the case of D, who lived for years with an abusive, sadistic spouse, and fell into a deep depression while she was with him.[171] She was unable to move forward from her experiences until years after their divorce when she decided to try and build her life anew.[172] As a first step, D went to a psychologist. During treatment she began to process that she was a victim of deliberate abuse, and, following this insight, filed a claim against her divorcee for the years of suffering he caused her and the harms she befell. The defendant soon filed a motion to dismiss the case on the grounds that the claim had already expired and therefore should be barred. However, the court decided to establish a precedent that recognized the unique situation of women living with an abusive partner, and upheld the suspension of the statute of limitations on the basis that D had previously not been cognizant of her potential cause of action.[173] The court considered the date on which D internalized the fact that she was being abused—which happened during psychological treatment—as the date on which she obtained knowledge of the facts that constituted a cause of action.[174] To this end, the court agreed to acknowledge that D developed a mechanism of psychological repression during her marriage, which affected her long after her divorce and prevented her from comprehending the injury she has suffered.[175]

3. Expiration of a Suit Due to Sexual Abuse of Minors in the Framework of the Family

The statute of limitations is routinely used as a defense even in relation to rape and sexual assault claims by vulnerable minors who suffered abuse at the hands of family members. Minors who were sexually assaulted by family members, and who subsequently had the courage to sue their abusers, are mostly aided by Article 18 of the Statute of Limitations Law, 1958,[176] which contemplates that the statute of limitations would not begin to run

170. The process of recognizing an injustice that warrants compensation is not unique to these women. In this sense, the intention is to track the civil creation of the legal dispute and its pre-legal sociological source. *See* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*…, 15 LAW & SOC'Y REV. 631 (1980–81).

171. CC (TA) 82377/99 Melzer v. Schreiber (March 7, 2010), Nevo Legal Database (by subscription) (Isr.).

172. *Id*., ¶¶ 23, 30.2.

173. *Id*., ¶ 23.

174. *Id*., ¶ 25.

175. *Id*., ¶ 30. Incidentally, the court decided that D's prolonged depression was also a legitimate ground to suspend the period of limitation, pursuant to Article 11 of the Statute of Limitations Act, which provides that the period of limitation can be suspended where there is evidence of mental impairment. *Id.*, ¶¶ 30-30.3.

176. 5718-1958, SH No. 251 p. 112 (Isr.), at 112. This was prior to the enactment of Article 2 to Statute of Limitations Act (Amendment No. 4), 5767-2007, SH No. 2103 p. 385 (Isr.).

until their 18th birthday.[177] This ensures that their right to file a suit expires only on their 25th birthday. Even this relatively considerate rule turned out to be draconian in incest cases and has obstructed its victims' access to realizing their rights in the civil courts. Numerous studies in this area have demonstrated the ubiquitous difficulties facing women that suffered sexual abuse when they were minors.[178] Such difficulties are amplified among those who suffered abuse from family members. In most cases, victims of sexual offenses reveal their story only after many years, as a consequence of the fear, shame, and guilt they experience in anticipation of the fact of their abuse becoming public. They find it difficult to mobilize the psychological resources necessary to file a claim, which would also involve confronting their terrifying attacker, and reliving their history of emotional and physical abuse.

This phenomenon of avoiding disclosure of the sexual attack is a classic feminine life experience and not frequently encountered in tort law. Therefore, the Statute of Limitations offers no solution to it. In most cases, victims of sexual abuse suffer severe psychological difficulties incepted at their first experience of abuse and continue to plague them throughout their lives.[179] These difficulties have far-reaching implications in all areas of the victims' lives and, as stated above, often deter women from claiming compensation for many years—if they are able to acquire the necessary psychological strength at all.[180] Many victims of childhood abuse exhibit "disassociation"—the repression and corollary denial of the abuse—which enables them as victims to function in daily life.[181] As a consequence of disassociation, many minors who were sexually assaulted as children only realize a causal link between the abuse they experienced and the damage it has caused years after the traumatic event(s) occurred, if they are able to at all.[182] Usually, this realization materializes only subsequent to intense and prolonged psychological therapy.[183] This phenomenon of disassociation is

177. Statute of Limitations Act, 5718-1958, SH No. 251 p.112 (Isr.), article 10.

178. *See, e.g.*, Jody Messler Davies, *Dissociation, Therapeutic Enactment, and Transference—Countertransference Processes: A Discussion of Papers on Childhood Sexual Abuse by S. Grand and J. Sarnat*, 2 GENDER & PSYCHOANALYSIS 241 (1997).

179. For detailed delayed and harmful effects of incest *see* Judith Herman, Diana Russel & Karen Trocki, *Long-Term Effects of Incestuous Abuse in Childhood* 143 AM. J. PSYCHIATRY 1293, 1295 (1986).

180. Alan Rosenfeld, *Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L. J. 206, 208–10 (1989).

181. *Id*. at 210, 212.

182. Margaret M. Cornish, *Tort Law—Applying the Discovery Rule to Toll the Statute of Limitations in Incest* Cases, 28 SUFFOLK U. L. REV. 323, 325–27 (1994) (identifying two types of incest survivors' claims against statutes of limitations: the first one includes people who repressesed their memories of the sexual abuse to an extent that they were unable to relate it to their suffered harms, the second one includes people who repressed all of the abusive memories astogether).

183. For groundbreaking readings, *see* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992).

of significant relevance to cases dealing with sexual assault victims.[184] However, courts have yet to decide on the impact dissociative responses should have on temporal limitations for a sexual assault claim. Indeed, this important and decisive question has been left for "further discussion" by the Supreme Court.[185]

Only after maintaining persistent and bitter feminist struggle was Amendment 4 to the Law on the Statute of Limitations passed in 2007. This amendment states in Articles 18a and 18b that in cases of sexual assault committed against a minor by a close family relative, the limitation period of seven years commences on the plaintiff's 28th birthday.[186] Though the amendment represents a great step in the right direction in establishing better accessibility to tort recourse for victims who were minors at the time of sexual victimization, it is nevertheless doubtful that it adequately meets the unique needs of these victims. Firstly, as the law is applied prospectively, claims which were outdated prior to the commencement of the amendment in July 2007 are still prohibited from being heard.[187] Secondly, due to the numerous emotional, mental and psychological difficulties described above, some victims are unable to file their claims and thereby may be prevented from accessing the justice system. Thirdly, the amended provision applies only to cases where the perpetrator was a "close family member;" namely a parent, uncle or sibling.[188] This narrow definition exempts other family members such as an uncle's brother or a cousin. These non-enumerated family members still have enormous effect on a victim's sense of fear, shame and wish to protest the familial whole. The same is true for influential non-family member adults, such as a family friend, supporter, or close neighbor.

D. INCENTIVIZING THE ESTABLISHMENT OF FEMINIST CIVIL SOCIETY ORGANIZATIONS AND PRIVATE LAWYERS

Tort law appeals greatly to practitioners due to its potential to yield a substantial stipend for the representing lawyer through the contingent fees mechanism.[189] Inherent in tort proceedings is the possibility of the transfer

184. Rosenfeld, *supra* note 180, at 210.

185. HCJ 6008/93 State of Israel v. John Doe 48(5) PD 845 [1995] (Isr.); CC (TA) 1027/05 State of Israel v. John Doe (May 6, 2009), Nevo Legal Database (by subscription) (Isr.); according to HCJ 6643/05 State of Israel v. John Doe (July 3, 2007), Nevo Legal Database (by subscription) (Isr.), ¶ 18 of Justice Arbel's judgment; HCJ 8098/04 Jane Doe v. John Doe 59(3) PD 111 [2004] (Isr.), the judgment of Justice Rubinstein. In cases where a plaintiff proved that she suppressed sexually violent incidents to the point that she could not remember them and therefore was unable to relate them to her injuries, the question of whether the grounds for the suit were born on the day when her memories were awakened and should therefore be the date on which the limitation period began, should be left for "future consideration." HCJ 8098/04 Jane Doe v. John Doe 59(3) PD 111, 120 [2004] (Isr.).

186. Statute of Limitations Act (Amendment No. 4), 5767-2007, SH No. 2103 p. 385 (Isr.).

187. The law was given effectiveness prospectively, starting July 10, 2007. *See id*.

188. *Id*., article 18A(b).

189. *See, generally*, Herbert M. Kritzer, *Contingency Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997–98).

of a significant amount of money to the plaintiff, which strongly incentivizes lawyers to practice in this area of private law.[190] This benefit of tort law may also serve to encourage the development of civil society organizations to be based upon a unique budget model whereby the organizations finance their social change activities using a proportion of the funds awarded to successful plaintiffs. This unique characteristic of tort law, combined with feminist analysis of the law, enables this practical change to develop significantly. However, such a vision can be realized only in concurrence with the courts' responsiveness to such a mindset.

The organization The Center for Women's Justice (Center) is an excellent example of one such feminist strategic move. The Center, whose operations are driven by an explicit feminist social consciousness, sought to challenge the disadvantage Jewish women experience in divorce proceedings, and utilized tort law to file compensation claims against men refusing to grant their wives a divorce.[191] These cases, which resulted in verdicts in favor of the female plaintiffs, were an impressive deterrent to other men seeking to obstruct their divorce proceedings.[192] Another excellent example of this development is the Human Rights and Women's Clinic, located at a private college, where the first successful tort claims were filed on behalf of women who were victims of sex trafficking.[193] Tmura Center is another notable NGO, established entirely on the underlying premises of intense feminist tort litigation.[194] This nonprofit organization works to fight discrimination and promote equality in Israel using tort law claims to hold public and private institutions, as well as individuals, accountable for injustices perpetrated under their auspices.[195] The litigation

190. This is as opposed to any other field of law where pecuniary relief is not the primary (and to a realistic extent, the only) remedy.

191. Susan Weiss, the organization's chairwoman, has provided academic insights into her work. Susan M. Weiss, *Israeli Divorce Law: The Maldistribution of Power, its Abuse, and the "Status" of Jewish Women, in* MEN AND WOMEN: GENDER, JUDAISM, AND DEMOCRACY 53 (Rachel Elior ed., 2004).

192. From an interview conducted with the Chairwoman of the Center, Attorney Susan Weiss, it seems that in all the judgments where a ruling was given in favor of the plaintiff, the reluctant husbands offered to grant their wives a divorce. *See Suing for Freedom: Women Denied Divorce Resort to Tort Claims*, Haaretz Magazine (Apr. 19, 2011), http://www.haaretz.co.il/misc/1.1171601 (Hebrew). The fact that this was made possible in return for relinquishing at least part of the right for tort compensation raises a new difficulty that reproduces an element of blackmail that a woman seeking a divorce must face. Rabbinical courts have started conditioning treating a woman's plea for divorce upon her withdrawal of her tort suit. See the details of such occurrence in the Supreme Religious Courts, as described by Justice Fogelman in HCG 568/13 Mavoi Satum v. Supreme Rabbinial Court (June 20, 2013) (unpublished) (Isr.), ¶ 1.

193. For the important verdict where Justice Levhar-Sharon exhibits feminist awareness *see* HCJ 10506/06 Jane Doe v. Mizrahi (Mar. 24, 2008), Nevo Legal Database (by subscription) (Isr.).

194. The author of this article is one of this NGO's founders, and supervises its legal work on a voluntary basis.

195. Information regarding the center's mission and activities can be found at TMURU CENTER, www.tmura.org.il (last visited Mar. 12, 2014).

puts a price tag on discrimination, which in turn acts as a significant deterrent against potential discriminators and policy-making authorities. The center uses tort claims to raise awareness regarding socially transparent feminine suffering and render these harms compensable. In one of Tmura Center's recent cases, the court granted compensation to a woman whose maiden name was deleted from the population registry and changed automatically to that of her husband after she got married, which was done against her will and autonomy.[196] This allegedly "private" case resulted in large-scale change for women, as the state amended its protocol, whereby women who married were now given a choice whether to change their maiden name upon marriage.[197]

Simultaneous to this development in civil society, it is becoming apparent that many private lawyers with feminist inclinations have emerged. These individual attorneys began to represent women in cases of a similar nature to those enumerated above, either privately, or using the assistance that the state provides for low-income citizens.[198] There also has been excellent cooperation between actors in the private, public, academic, and feminist tort markets which contributes in many different ways to expanding this important progressive development.[199] In addition to its positive aspects, this process also shows the potential of translating the language of feminist analysis—often focused on theory and philosophy—into a reality of on-the-ground social change. Feminist criticism of tort law ensures actual application of its principles and instantaneous influence over its recipients. This also lends considerable importance to the analysis and to the importance of its continued development in this specific area.

E. FUTURE CHALLENGES FEMINIST ANALYSIS FACES—BREAKWATER OF THE WAVES

It seems that any summary of the impact of feminist analysis on tort law, however positive, warrants acknowledging its limitations. In the Israeli case, two such caveats can be pinpointed; while one functions on the substantive level, the other operates on the symbolic-rhetorical level. However, both of

196. CC 29770-08/11 (TA), Bitton v. The State of Israel (Oct. 18, 2012), Nevo Legal Database (by subscription) (Isr.).

197. *Id*.

198. Though no official data is available to prove this unfolding trend, the fact that the cases cited in this article are *all* from the last five years could serve as great indicator.

199. Tmura Center, for example, regularly participates in workshops for entrenching this new legal trend in private as well as public sector lawyers. TMURU CENTER, www.tmura.org.il (last visited Mar. 12, 2014). The Center also serves amicus pleas at the requests of private lawyers litigating feminist tort cases. *See, e.g.*, CC (TA) 1960/06 Jane Doe v. Ofer Glazer, (Nov. 30, 2011), Nevo Legal Database (by subscription) (Isr.) (presenting the prevalence of sexual harassment and its typical harms); HCJ 7565/09 Jane Doe v. John Doe [April 1, 2010], Nevo Legal Database (by subscription) (Isr.) (presenting the need for punitive damages in sexual assault cases).

these limitations are closely related and therefore require similar analytical approach.

1. The Substantive Level

As claimed and demonstrated above, the body of knowledge and development that feminist analysis has produced in tort law has begun to go a promising direction. However, feminist analysis has yet to abolish advents of androcentric dynamics within tort law, which yield new arenas of discriminatory doctrines and limit women's right to compensation through tort law. To illustrate this point before closing the door behind the feminist struggle within tort law, it is prudent to briefly demonstrate the development of some antifeminist tortious trends and the subsequent need they create for persistent feminist analysis.

For some time now, courts have demonstrated a clear tendency of failing to recognize various instances of sexual abuse as justifying the imposition of punitive damages on primary tortfeasors.[200] Recently, the issue reached the Supreme Court, which confirmed this inclination and reinforced it as precedent.[201] The regressive judgment was given on appeal, after two lower courts refused to accept a young girl's request to impose punitive damages on a man who perpetrated a series of indecent sexual acts on her when she was only six years old.[202] The girl invoked a battery claim, based on the factual foundation which was proven in the criminal proceedings, wherein the defendant was found guilty.[203] However, though the defendant's tort liability for battery was recognized, the plaintiff's plea for punitive damages was denied.[204] Subsequently, her appeals to the District and the Supreme Court were denied as well. An appeal for special Further Discussion of this novel decision by an extended bench was likewise rejected.[205]

The court's holding that punitive damages are inapt in cases that underwent criminal proceedings raises counter feminist concerns in like

200. *See, e.g.*, CC (TA) 1960/06 Jane Doe v. Ofer Glazer, (Nov. 30, 2011), Nevo Legal Database (by subscription) (Isr.) (accepting a sexual attack claim of a nurse against her private employer); CC 854/07 (Hi) Jane Does v. John Doe (Aug. 4, 2009), Nevo Legal Database (by subscription) (Isr.) (accepting rape claims of minors against their mother's spouses); CC 2039/07 (TA) Jane Doe v. John Doe (Dec. 27, 2009), Nevo Legal Database (by subscription) (Isr.) (accepting a rape claim of a woman against her "spiritual" coach).

201. HCJ 9670/07 Jane Doe v. John Doe (July 6, 2009), Nevo Legal Database (by subscription) (Isr.).

202. *Id*., ¶ b.

203. CC (TA) 1112/00 State of Israel v. John Doe (2000) (unpublished) (Isr.). The defendant was sentenced to two years in prison, with two years on parole and was required to pay a minor fine of 5,000 IS. These facts are described by the Supreme Court in its decision in the civil suit in HCJ 9670/07 Jane Doe v. John Doe (July 6, 2009), ¶ b.

204. HCJ 9670/07 Jane Doe v. John Doe, ¶¶ 22-27.

205. The request for further hearing based on the important implications of the decision was rejected by then-Chief Justice Beinisch. *Id*. The Center for Legal Clinics, the Center for the Protection of Children Victims of Sexual Violence Rights, the Center for Children and Family Rights, the Israeli Bar Association, the Women Crisis Center, and the Tmura Antidiscrimination Center all joined the case as amici.

cases for various reasons.[206] From a conceptual perspective, this dismissal ignores the important function of deterrence in tort law in general, and punitive damages in particular, thereby reducing tort law's ability to deter potential perpetrators of sexual assaults.[207] This is particularly true given that extensive research reveals that the average compensation awarded to women in similar criminal proceedings—and indeed were also awarded to the plaintiff in this particular case—is as low as only 5,000 NIS.[208] This amount appears to function more as a symbolic and repetitive gesture rather than an award that takes into account each injury's individual implications. Furthermore, while all malicious actions require deterrence, in cases of violence and sexual assault, deterrence is especially vital.[209] These behaviors are not socially unacceptable in the same manner that the court considers, for instance, medical malpractice to be unacceptable, for which it awards compensation.[210] The distinction is that these are behaviors which are *mala per se* and dangerous to our social existence. Moreover, in keeping with this conceptual approach, the fact that punitive damages were traditionally awarded to victims of criminal assaults and are still imposed in cases of non-sexual batteries, makes it particularly difficult to understand the Court's decision, as acts of sexual assault easily fit within the definition of criminal physical assault.[211] The practical effect of denying punitive compensation is especially severe for women, since it denies them a significant component of compensation, and therefore makes their claims less attractive to them and to lawyers representing them.[212] The Court's decision also terminated an important progressive move that had begun to take shape, which distinctly recognized punitive damages as a central component of compensation for sexual assault.[213]

206. The Court did not entirely rule out punitive damages in cases where a punishment was imposed on the defendant in criminal proceedings, as the then-Chief Justice Beinisch put it, but rather maintained that, in these cases, such damages should be deemed "most exceptional of the exceptional cases." *Id*., ¶ 8.

207. Deterrence is one of tort law's primary goals. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 24–30 (1970); Daniel W. Shuman, *Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 118–132 (1993); Israel Gilead, *The Boundaries of Efficient Deterrence in Tort Law*, 22 MISHPATIM 421 (1993–94) (Hebrew).

208. *See* CC (TA) 1112/00 The State of Israel v. John Doe (2000) (unpublished) (Isr.).

209. The importance of retribution cannot be underestimated in such cases. *See* Keren-Paz, *supra* note 87.

210. Social blameworthiness rather than moral blameworthiness underlies negligence liability. The first one to isolated negligence as the comprehensive embodiment of the principle of fault liability in tort law was Holmes. *See* OLIVER W. HOLMES, THE COMMON LAW (1881).

211. Punitive damages in Israeli tort law were incepted and repeatedly recognized within assault and battery case law. *See, e.g*., HCJ 216/54 Sneider v. Glik, 9 PD 1331 [1955] (Isr.); HCJ 30/72 Friedman v. Segal, 27(2) PD 225 [1973] (Isr.); CC (Jer) 7793/05 Kazin v. Avitan (Aug. 6, 2006), Nevo Legal Database (by subscription) (Isr.).

212. FLETCHER, *supra* note 126, at 58–65.

213. *See, e.g.*, CC (TA) 2191/02 Jane Doe v. John Doe (Mar. 8, 2006) Nevo Legal Database (by subscription) (Isr.). In another case of a gang rape, the punitive damages of 1,325,000

Feminist analysis can also point to the denial of this form of compensation as a mistaken understanding of the basic principles of tort law. Indeed, it is possible to contend that courts' refusal to award punitive damages to women in these cases is equivalent, in practice, to determining—contrary to the perception of tort law in common law and in Israel in particular[214]—that tort law does not have the power to grant punitive damages. This conclusion arises from the simple reasoning that it is difficult to imagine another area that is more difficult than, or fundamentally different from, sexual assaults on the body that would warrant a deviation from this developing practice. Therefore, it seems that, *de facto*, such custom will render void this type of compensation. Especially outrageous in this context was the Court's reasoning that, in cases where the offender has been criminally prosecuted and punished, there is no reason to punish him again.[215] Aside from the disregard for the independent function of punitive damages in tort law and the confusing relationship it evokes with criminal law, the restriction on punitive damages is fortuitous for the most formidable transgressors; the case against these defendants is clear and therefore the process of imposing criminal liability on them for their actions is relatively simple. The women who are injured by these offenders—and who are likely to suffer most from their acts due to their especially heinous nature—will remain with a limited compensation scheme for redress, where until recently, tort law afforded their harms special treatment.

This matter highlights the inherent tension between the legislative purpose underlying awarding punitive damages in civil proceedings, which seeks to recognize certain behaviors as reprehensible,[216] and the risk of

NIS served as the major component of the compensation for the victim. *See* CC (Hi) 209/05 Jane Doe v. Mizrahi (May 1, 2008), Nevo Legal Database (by subscription) (Isr.).

214. The principled authority of Israeli courts to grant punitive damages was recently restated by the Supreme Court in HCJ 9656/03 Etinger Estate v. The Restoration Venture of the Jewish Quarter in Jerusalem 58(4) PD 486 [2004] (Isr.). This practice is long known to prevail in common law systems, to different degrees. For America, *see* FLETCHER, *supra* note 126, at 58–66. For Australia, for instance, *see* FRANCIS A. TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 530 (3d ed. 2001).

215. *See* HCJ 9670/07 Jane Doe v. John Doe (July 6, 2009), Nevo Legal Database (by subscription) (Isr.). Justice Rubinstein stipulated:

> I think that if as a rule, punitive damages are only awarded in exceptional cases, if there is a punishment given in a criminal proceeding, it will only be in cases of the exception to the exception (so exceptional that it is hard to even give an example, and it may be that we are referring to such cases where for some reason it was not possible to impose criminal punishment). The reason for this is clear. The rationale for the award of punitive damages is 'punitive and deterrent' . . . they are 'designed to reflect society's disgust with the criminal's behavior.' . . . In general, when criminal proceedings are carried out, these objectives are achieved in the criminal process—this is their natural place and they have no real place in civil procedure.

Id., ¶ 23.

216. *See, e.g.*, HCJ 140/00 The Estate of Etinger v. The Jewish Quarter Development Company 58(4) PD 566 [2004] (Isr.); HCJ 9656/03 The Estate of Marziano v. Zinger (April

double punishment which would occur if criminal proceedings have already taken place and the defendant has been convicted. Indeed, there is undoubtedly a connection between compensation granted in criminal proceedings and civil proceedings, which adjudicate the same matter. Nonetheless, there are some fundamental substantive distinctions between the two. It is significant that the defendant sits at the center of criminal proceedings, while the victim sits at the center of civil proceeding, asking for recognition of the injuries *she* has incurred.[217] Furthermore, assuming that double punishment does occur, in these instances it should be considered just; punitive damages are designed to express indignation over abhorrent behavior, as well as deterring potential offenders and ensuring an educational effect, which may prevent the recurrence of the act.[218]

Moreover, even if the court had ruled that punitive damages were unjustified, it would have been prudent for it to provide a pragmatic alternative in the form of aggravated damages. This form of compensation is fundamentally different from punitive damages, since it is intended to express the severity of the harmful behavior and therefore falls within the boundaries of compensatory damages instead. When the court awards aggravated damages, it must take into account the severity of the offender's behavior, which impacts the level of the injuries incurred by the plaintiff, and can subsequently lead to an increase in the amount of compensation to which the plaintiff is entitled.[219] Such was the case with *L v. L*[220] where a minor, assisted by her mother, initiated proceedings against her father who had sodomized and raped her. One of the heads of damages requested by the plaintiff was aggravated damages and\or punitive damages. Though the court stated that it could not award the plaintiff punitive damages, it subsequently awarded her aggravated damages which reflected the severity of the injuries that she incurred.[221] In this way the court neutralized the fear

11, 2005), Nevo Legal Database (by subscription) (Isr.); HCJ 8382/04 The Hadassah Medical Foundation v. Mizrahi (Feb. 2, 2006), Nevo Legal Database (by subscription) (Isr.).

217. "Though within Civil Procedure the court considers imposing 'punitive' damages, and within criminal procedure the court considers imposing damages, ostensibly 'civilian,' one should not mix the two processes." CC (Hi) 19415/02 Dina v. Doron 17 (Jan. 30, 2005), Nevo Legal Database (by subscription) (Isr.).

218. This understanding is acknowledged in Israel as well as in the United States. *See* Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 507 (2005); TEDESCHI, *supra* note 151. For American law *see* FLETCHER, *supra* note 126, at 58–65.

219. *See* HCJ 802/87 Nof v. Avneri, 45(2) PD 489, 494 [1991] (Isr.); HCJ 30/72 Friedman v. Segal, 27(2) PD 225 [1973] (Isr.); DAPHNE BARAK-EREZ, CONSTITUTIONAL TORTS: THE PECUNIARY PROTECTION OF THE CONSTITUTIONAL RIGHT 276–77 (1993); Bitton, *Dignity Aches*, *supra* note 30, at 171–77.

220. CC (Jer) 2160/99 L. v. L. (Aug. 31, 2005), Nevo Legal Database (by subscription) (Isr.).

221. *Id*. at 235. The aggravated damages that were awarded to the minor were 300,000 IS which shows the importance the court attributed to this head of damage. A bad example of the use of this tool was the award of 5,000 IS in the case of *Jane Doe* for nonmonetary damages. *See* CC (TA) 1112/00 State of Israel v. John Doe (2000) (unpublished) (Isr.).

that punitive damages would serve as double punishment, while at the same time compensated the victim with a significant sum, additional to traditional damages calculus.

2. The Symbolic-Rhetorical Level

After carefully reading the abovementioned progressive tort decisions in Israeli law it is clear that in most of them the court deliberately refrained from applying explicit feminist analysis in its rulings.[222] In some cases, this disregard has had little effect on the results of a case, if at all. This is because from a substantive perspective, the court complied with the feminist perspective and reached an appropriate result. Nevertheless, satisfaction with the result, without the accompaniment of feminist insight as to what constitutes worthy tort conduct within the framework of power relations, may lead to a limited understanding of these cases' tortious legacy.[223] Aside from this, the systematic abstention of the court from recognizing feminist analysis of tort law does not provide this rich and important analysis its rightful place, and allows for its marginalization within the conceptual debate.[224] For these reasons, the unique and enriching contribution of feminist analysis through open recognition of its importance to legal reasoning by the courts must be more apparent and encouraged.[225]

Similar discontent with this amount was expressed by Justice Rivlin in his concurrence, where he proposed increasing the amount of compensation to 300,000 IS.

222. One of the few times where the Supreme Court addressed feminist scholarship was in the case of HCJ 10064/02 Migdal Insurance Company v. Abu-Hanna 60(3) PD 13 [2005] (Isr.). There, Justice Rivlin referred to the writing of Martha Chamallas as a possible theory for analyzing the case at hand. However, eventually, he decided to refrain from applying feminist analysis to resolves the case, and stated that utilizing it in the future should be left to "further consideration." *Id*. at 46.

223. Using a feminist approach in cases, which warrant feminist analysis, is harmful to tort law itself. See, for example, the problem of ignoring power relations between spouses in the case of refusal to grant a divorce by women to their husbands, as discussed in *supra* note 123.

224. *See, e.g.*, Benjamin Shmueli, *Tort Compensation for Those Being Refused a Divorce*, 12 HAMISHPAT 285 (2007) (Hebrew). In his article, Shmueli justifies imposing liability on men who refuse to grant divorce without resorting to feminist approach. *Id*. at 288–89. This position, as stated, ignores the inherent limitations of such analysis. The paper was received with enthusiasm by the courts, which often cite it. *See, e.g.*, CC (TA) 24782/98 N.S. v. N.Y. (Feb. 14, 2008), Nevo Legal Database (by subscription) (Isr.); CC (Jer) 6743/02 K. v. K. (July 21, 2005), Nevo Legal Database (by subscription) (Isr.).

225. A step in the right direction was a statement in a recent decision handed out by the Supreme Court, supporting relatively high and unprecedented amount of money as compensation for a woman plaintiff injured at the hands of her abusive former husband: "[C]ourts, especially those dealing with domestic issues, should pay particular attention to my statement. The phenomena of domestic violence has been identified time and again as a harm to be abolished . . . but there is no reason in the world why Torts, too, not participate in this (legal) effort. . . . The courts are authorized to use compensatory mechanisms also as a tool in the comprehensive battle against violence." Justice Rubinstein, who wrote this statement, thereafter refers to a few resources, among them, feminist writing on the topic. HCJ 7073/13 John Doe v. Jane Doe (Dec. 31, 2013), Nevo Legal Database (by subscription) (Isr.), ¶ 8.

F. SUMMARY—FEMINIZATION OF TORT LAW—TOWARDS A BETTER UNDERSTANDING

From providing an overview of the contribution of feminist analysis to tort law, and reviewing the various stages the feminist analysis has undergone, a central phenomenon is revealed; during the second wave of feminist analysis, this approach's virtue was not set in its value as an outsider, feminist critique. It further became a tool for facilitating a better and deeper understanding of tort law more generally, from an internal point of view. Judgments that addressed feminine life experiences reshaped the account of tort liability's most distinctive elements, rendering second wave feminist critique of tort law transformative in nature.[226]

A comparative feminist analysis of gender inclinations of tort law in different countries allows us to understand the way in which legal systems achieve a balance of interests under this field of law, using various approaches.[227] Comparative resources can attest to the importance of the continued development of feminist analysis in equality-striving legal systems, as a source of benefit to women as well as to other socially disadvantaged groups and to feminism's role in deepening contemporary accounts of tort law's social engineering functions and importance.

226. *See* the text of this article, accompanying *supra* notes 56, 80, 82, 85, 106.
227. Bitton, *Liability of Bias*, *supra* note 3.

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